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WISCONSIN. SUPREME COURT

WISCONSIN REPORTS

144 June 24

CASES DETERMINED

IN THE

SUPREME COURT

OF

146

WISCONSIN

OCTOBER 15, 1910—JANUARY 31, 1911.

FREDERIC K. CONOVER

OFFICIAL REPORTER

CHICAGO
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1911

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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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SUPREME COURT RULE 19.

As amended April 5, 1911.

Before a cause is called for argument the plaintiff in error or appellant shall file with the clerk *fifteen* copies of the printed case, and each party *fifteen* copies of his brief.

MEMORANDUM

In *Thompson v. American W. P. Co.* 143 Wis. 598, a motion for a rehearing was denied January 10, 1911.

ERRATA.

Vol. 118.

Page 335, line —2. For proving, read providing.

Vol. 143.

Page 119, lines 8, 9. For 140 Wis. 189, read 130 Wis. 189.
" 655, line 7. For a reapportionment, read an apportionment.

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CASES DETERMINED

AT THE

August Term, 1910.

STATE EX REL. MCGRAEL and others vs. PHELPS and others.

October 8—October 15, 1910.

Statutes: Construction: Words implied: Primary elections: Regulation: Constitutional law: Impairing right of suffrage: Right of party to place on official ballot: Percentage of votes cast.

1. To determine the purpose of a statute expressed in literal sense, words necessarily implied from those used, are as clearly a part thereof as the written words.
2. In searching for the purpose of an enactment which, applied in the ordinary sense to the subject thereof, would lead to a result so unreasonable as to suggest that such was not its purpose, some other and a reasonable meaning should be adopted, if one can be found within the fair scope of the language used.
3. In the situation suggested in the last foregoing, the court may "consider the surrounding circumstances, the existing conditions, the evils to be remedied, the objects to be attained," "look at the whole and every part of the statute, to its subject matter, to its effects and consequences, to its reason and spirit," and then read it with all words in place, necessarily or reasonably implied, so as to harmonize and give a sensible effect to every portion thereof and express the apparent intent.
4. In ch. 477, Laws of 1909,—providing that if the aggregate of votes at a primary election for all candidates "for nomination for any one office voted for on any party ballot" shall be "twenty per cent. or more" of the number "cast for nominee of such party for governor at the last general election" the one receiving the most votes shall have his name "placed on the official ballot at the following election" as such party's candidate for such office, and if such aggregate shall be less than such per cent. such person shall have his name placed on such ballot with individual nominations under the designation "independent,"—by necessary implication, the words—for the particular official district involved or words of similar import—should be deemed in place after the words "for any one office"

and the words—in such district or words of similar import—after the word "governor."

5. The literal sense of the words "vote cast for nominee of such party for governor," standing alone, is so contrary to the apparent legislative intent, that words, as before indicated, should be deemed in place by reasonable, if not necessary, implication.
6. In general, a legislative interference with the elective franchise must stand the test, at least, of these fundamentals of the state constitution:
   (a) The express and implied inhibitions of class legislation;
   (b) The recognized existence and inviolability of inherent rights;
   (c) The constitutionally declared purpose of government;
   (d) The express guaranty of the right to vote.
7. Sec. 1, art. I, of the constitution is a prohibition, by necessary implication, of legislation inconsistent therewith.
8. The right of suffrage includes the right to form political parties, and the right of each party to have all the machinery, not reasonably prohibited by law, for making its organization effective as to the policy of its members, by electing officers in harmony therewith.
9. Every legislative interference with freedom of voters to form political organizations and act under their respective party names is, at the same time, an interference with the right to vote; so the limit of power as to one is substantially the limit as to the other.
10. Rights mentioned in the last foregoing are included in sec. 1, art. I, of the constitution and are, by necessary implication, protected thereby from undue legislative interference, and are likewise protected by the limitation (in the words of grant) in sec. 1 of art. III of the constitution.
11. Notwithstanding constitutional inhibitions of legislative interference with the right to vote and rights incidental thereto, there is a legitimate field of legislative activity in the nature of regulation.
12. The field of legislative regulation mentioned does not extend beyond making laws which are reasonable.
13. The scope of reasonable regulation is indicated by its purpose, viz.: to conserve guaranteed rights and promote their efficiency.
14. The office of regulation being to conserve, a regulation going clearly beyond, into the field of impairment, is unreasonable.
15. The extent to which the legislature may go in the way of regulation of rights is primarily a matter of legislative judgment, subject, however, to judicial review.

16. The review mentioned has no regard to expediency; it has regard only to whether, from any fair point of view, the regulation, as a conservation measure, is legitimate, every reasonable doubt being resolved in favor thereof.
17. A regulation which necessarily tends to afford one political party of substantial status a better opportunity for efficient existence than another, however large, or materially impair or prevent fair opportunity for any organization of voters of substantial numbers and standing to compete for favor, is an unreasonable interference.
18. A legislative interference with freedom, as regards political party organization and contest, which naturally impairs opportunity for members of any political party of substantial significance to efficiently maintain their organization, and, to that end, present their party candidates and principles, as such, to the voters at large for indorsement, is unreasonable.
19. The validity of a legislative police regulation depends upon whether the ends sought to be attained are appropriate, and the means to such ends are also appropriate.
20. Legislative regulations of the right to vote and rights incidental thereto are appropriate to at least these ends:

    (a) To keep the ballot sheet within a reasonably workable compass, both from the standpoint of the party and the individual right;

    (b) To promote such party integrity on the only legitimate basis for legal conservation of party existence, as to discourage electors claiming to belong to one organization from invading the primary of another;

    (c) To stimulate exercise of the right to participate by voting in public matters.
21. A legislative condition of a person having his name, as that of a party nominee, placed on the official ballot, under his party designation, in a special party column, that he shall have received a sufficient number of votes for such place at the preceding primary to fairly indicate that he is such party's nominee, and that the party has a reasonably significant membership, is in the field of legitimate regulation respecting the suitableness of the ballot, both as regards the major and minor election districts.
22. Some standard of measurement by which to test the competency of a political party to have the use of the official ballot sheet for the purpose of a party ballot follows, necessarily, from the use of the Australian ballot form.

The votes cast in an official district for a party nominee for gov-

ernor, is a proper basis from which to derive a unit of measurement for such party's status at the succeeding primary election, and a number equal to twenty per cent. thereof is a fair unit by which to determine the minimum of party strength in such district, required to be shown at such primary by such party, as to any particular office for such district, to entitle the person favored as the party nominee to have his name placed, as such, in the party column on the official ballot at the succeeding election.

24. The means indicated for regulating the workable size of the ballot sheet applies to minor districts as well as the state at large; treating a political party as having, in a sense, an individuality in each official district separate and apart from that in any other district.

25. The method mentioned for regulating the size of the official ballot sheet, is also a proper means of regulation to prevent participation by members of one party in the contests between candidates at the primary, of another party.

26. Such method is also a legitimate means of stimulating exercise of the elective franchise.

[Syllabus by Marshall, J.]

Timlin, J., and Winslow, C. J., dissent.

Barnes, J., concurs in the conclusion reached.

Action invoking the original jurisdiction of this court to compel the board of county canvassers of Milwaukee county to certify the names of the petitioners as those of the regular nominees of the Democratic party in said county, entitled to have their names placed on the official ballot as such for the general election in 1910.

The petition, by appropriate allegations, shows that at the last primary election each petitioner received the greatest number of votes cast thereat for any one to be the Democratic party candidate for the particular county office for which he was a candidate at such primary, but that the aggregate vote of all candidates for such office was not twenty per cent. of the vote of such county for the Democratic candidate for governor at the general election in 1908, and by reason thereof the board of canvassers will not, unless judicially coerced thereto, certify his name for a place on the official ballot as the

candidate of his party for such office at the next general election. The petition further shows, by appropriate allegations, that the Democratic party is a political organization which has existed for many years and, without exception, on all occasions therefor, presented candidates for public offices and proclaimed party principles to be represented by such candidates.

The defendants demurred to the complaint upon the grounds: (1) that this court has no jurisdiction of the subject of the action, and (2) that the complaint does not state facts sufficient to constitute a cause of action.

The cause was argued and submitted on October 8, 1910.

For the relators there was a brief by *Joseph E. Davies,* with *J. E. Dodge* and *John A. Aylward,* of counsel, and oral argument by *Mr. Davies* and *Mr. Aylward.*

For the defendant there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

On October 15, 1910, the court announced its decision (WINSLOW, C. J., and TIMLIN, J., dissenting) sustaining the demurrer and dismissing the complaint. The points decided were stated in a memorandum decision and are included, in substance, in the syllabus by MARSHALL, J., at the head of the case, and are covered by the opinion of the court, *post,* p. 6. Among other propositions the following were thus stated in that memorandum:

"The declaration of rights contained in section 1, article I, of the constitution, is a prohibition by necessary implication of legislation inconsistent therewith.

"The right of suffrage includes the right of voters to separate into groups according to their political beliefs respecting governmental policies, and the right of every group to organize and have all the machinery in that regard not reasonably prohibited by law for making the organization effective as regards declaring the policy of its members, and vitalizing such

policies by electing officers in harmony therewith to legislate and execute law to that end.

"Every legislative interference with freedom on the part of voters to form political organizations and to act under their chosen party names to accomplish the purposes of the organizations is at the same time an interference with the right to vote, so the limit of power as to the one is substantially the limit of power as to the other.

"The office of regulation of the right to vote and the rights incident thereto being to conserve and promote efficiency, any so-called regulation which goes clearly beyond the boundaries of conservation into the field of impairment or destruction, is unreasonable and inhibited by the constitutional guaranty of the rights of suffrage and inhibition of interference with inherent rights."

On October 25th the relators moved for a rehearing, and also moved that Supreme Court Rules 37–41, relating to motions for a rehearing, be suspended. The latter motion was denied; and the motion for a rehearing was afterwards abandoned.

The following opinion was filed December 14, 1910:

Marshall, J. The first ground of demurrer, counsel assume was passed upon on the application for leave to sue in this court. Not so, except so far as to enable the parties to raise all questions by appropriate pleadings. However, no reason occurs to the court why it should not exercise jurisdiction, and, as counsel have not argued the matter, it is passed as usual without more than an incidental notice.

The second ground of demurrer challenges the constitutionality of ch. 477, Laws of 1909, in that it precludes any person from having his name appear on a general election official ballot as a party candidate unless he shall have received at least a plurality of the votes cast for the place at the preceding primary, and unless the aggregate of all his party votes for can-

didates for the office at such primary shall be equal to "twenty per cent. or more of the votes cast for nominee of such party for governor at the last general election."

The law must be considered with reference to the requirement that the form known as the Australian ballot shall be used at an election.

This is the exact language to be examined:

"If all the candidates for nomination for any one office voted for on any party ballot shall receive in the aggregate twenty per cent. or more of the vote cast for nominee of such party for governor at the last general election, the person receiving the greatest number of votes at such primary election as the candidate of such party for such office, shall be the candidate of that party for such office, . . .

"If all the candidates for nomination for any one office voted for on any party ballot shall receive in the aggregate less than twenty per cent. of such votes so cast at such last general election, no person shall be deemed to be the party nominee for such office, but the person receiving the greatest number of votes at such primary as the candidate of such party for the office shall be deemed an independent candidate for such office, and his name shall be placed on the official ballot in the column of individual nomination and he shall be denominated in such column as 'independent.' "

Thus no party can, in a special column, be represented by a candidate for an office at one election, unless, *first,* it shall have had a party candidate for governor at the preceding general election; *second,* it has sufficient members in the election district in question, who have sufficient interest in party integrity to and do poll at the primary for all persons there competing for first place as the party choice for such office to stand as such on the official ballot, equal to twenty per cent. of the political party vote cast for governor at such preceding election.

It is suggested that the words "twenty per cent." as written, point to the total vote in the state, and so make the law entirely unworkable and void. Manifestly, taken literally, the

law would destroy party representation on the official ballot, as to all minor election districts, since it cannot be well supposed but that, in general, the members of any political organization would be less in each such district than twenty per cent. of such party's vote throughout the state. The legislature could not have in mind such an absurdity, yet, there is no way to avoid the result except by judicial construction; that ever-ready and indispensable instrumentality for use in remedying legislative inadvertences and want of appreciation of the importance, in making written law, of speaking with language of unmistakable meaning in the literal sense of words. If it were not for judicial power to give effect to ideas, however obscurely expressed, if yet not so hidden as to be undiscoverable,—in view of the objects designed to be attained, the circumstances dealt with, the consequences of a literal or too literal interpretation, and many other lights that might be mentioned,—and not so out of harmony with the sense of the language used as not to be readable therefrom; giving thereto the widest reasonable scope; supplying all words reasonably suggested as in place by those used; eliminating or changing those clearly improperly used and transposing words or clauses, if necessary from proper to improper locations,—much legislation would fail.

The scope of judicial power of construction is strikingly illustrated in *Neacy v. Milwaukee Co., post,* p. 210, 128 N. W. 1063. A word expressing an idea, very obscurely, considering its location, was expanded by the addition of other words, the whole then transferred to its proper location as a qualifying clause, and another clause was transposed to its proper location, so that the collection of words which, read literally, was senseless, was made to serve the purpose intended.

The construction now required is not difficult. In one view the law does not need construction at all. It is a cardinal principle for reading statutes that words not used, but necessarily implied from those which are used, are as clearly a part

of the act as the written words, and to be so deemed in their appropriate place. Applying that, in view of the manifest purpose of the act before us, the words, *for the particular official district involved,* or similar words, after "for any one office," and the words, *in such district,* or similar words, after "governor," can be readily seen in place.

If the foregoing states the case too strongly in favor of the act, there are other rules which accomplish the same result.

A highly unreasonable purpose; one which would clearly render a legislative enactment void for uncertainty or unconstitutionality, is never to be attributed to the lawmaking power if that can reasonably be avoided. It must be presumed as to a written law that some sensible legal end and some sensible legal means of accomplishing that end were in view. Therefore, regardless of how crude and obscure may be the forms of expression used by the legislature, the court should not tire of searching for its purpose and some sensible way of so translating the legislative language as to express it, without having exhausted all judicial power to that end.

To discover the legislative purpose in an enactment, hidden in obscurity, as has often been said, the court can and should consider the "surrounding circumstances, the existing condition of things, the evils to be remedied, the objects to be attained" (*Clark v. Janesville,* 10 Wis. 136), "look at the whole and every part of the statute and the apparent intention derived from the whole, to its subject matter, to its effects and consequences, and to the reason and spirit, and thus ascertain the true meaning of the legislature." *Harrington v. Smith,* 28 Wis. 43. Having discovered the evident legislative intent, the letter should be sacrificed, within the uttermost boundaries of reason, to effect it. *Haentze v. Howe,* 28 Wis. 293; *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544; *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 79 N. W. 422; *Rice v. Ashland Co.* 108 Wis. 189, 84 N. W. 189. To that end a disjunctive may be turned into a conjunctive, *Att'y Gen. v. West*

Wis. R. Co. 36 Wis. 466; a clause expressing an idea wholly out of harmony with the purpose may be disregarded and words expressing the real intent substituted, *Palms v. Shawano Co.* 61 Wis. 211, 21 N. W. 77; a material omission may be supplied, *Custin v. Viroqua,* 67 Wis. 314, 30 N. W. 515; and obscure qualifying words, used out of place, may be expanded into a qualifying clause and transposed to the proper place, and other transpositions be made in connection therewith, *Neacy v. Milwaukee Co., supra.* "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." *U. S. v. Freeman,* 3 How. 556, 565; *School Directors of Pelican v. School Directors of Rock Falls,* 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049. As a correlative: "A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." *People ex rel. Att'y Gen. v. Utica Ins. Co.* 15 Johns. 358, 379. That doctrine, in the whole, is found often stated in the books and applied to supply or eliminate or change words, departing widely from literal sense when necessary to effect a manifest intent. *People ex rel. Bussey v. Gaulter,* 149 Ill. 39, 36 N. E. 576.

True, in construction, the boundaries between the judicial and legislative field must not be passed. The letter must not be unreasonably violated. In sacrificing it the court, to reach the intent, must proceed with reason. While it may supply obvious omissions, make transpositions, expand obscure words, reject unnecessary or improperly or inadvertently used words, and view words broadly or narrowly or commonly, according to circumstances, in the ultimate, the law's vitality must be found in it and to have been reasonably placed there by the lawmaking power.

It is so very plain that the legislature did not intend any such absurd and revolutionary result as would follow from giving literal effect to its visible words; did not intend to speak of the gubernatorial vote with reference to the respective election districts,—the words suggested as in place, though not writ-

ten, are at least there by reasonable implication, which amply satisfies the case.

It may be that too much time and space has been given to the subject of construction. But such attention was given thereto in considering the case, that it was thought best to treat the matter with considerable fulness, following in that regard the points decided and promulgated before the writing of this opinion.

We now come to the points urged by counsel. The major proposition and the one dominating the whole, is that the law of 1909 materially impairs the right to vote, and is, therefore, an unconstitutional interference with such right.

In a logical treatment of such major proposition the nature of the right involved may well be considered. Without adequate understanding thereof one can hardly discover and appreciate its constitutional safeguards.

It is often said by judicial and elementary writers that the right to vote is not a natural right; that it is a mere privilege which may be granted or not, or granted upon condition and when granted taken away or modified; all according to the discretion of the lawmaking power, in the absence of express constitutional inhibition to the contrary. Few are found who have ventured to challenge the doctrine that the right to vote is more than a mere legislative privilege, in the absence of a grant in the fundamental law, which may not be strictly correct as it is generally understood.

The idea that the right to vote is no more than a mere privilege was announced early as a justification for legislative interference therewith, and has been unqualifiedly reiterated over and over again and with growing emphasis as such interferences have progressed in severity. Thus it was said by a divided court in *Healey v. Wipf,* 22 S. Dak. 343, 117 N. W. 521:

"The election franchise is not a natural right. It is a privilege which may be taken away by the power that conferred it; and the only limitations upon the power of the legislature

to regulate its exercise and enjoyment are the express limitations found in the federal and state constitutions."

The history of the subject shows that the idea is of foreign origin. It existed here prior to the Revolution under our then borrowed system. It is a relic of the old world systems. Thus it will be seen in *Frieszleben v. Shallcross,* 9 Houst. (Del.) 1, the court reasons from the prevailing ideas and conditions prior to 1776.

The difficulty seems to have been in failing to distinguish between fundamental limitations which the people, in forming a government, may place upon a right and the creation of the right itself. So the idea took root that,—the change from the old to the new system marked by the Declaration of Independence, the basic features of which have been incorporated into every written constitution in this country and in none more significantly than our own,—did not change the nature of those things which had been commonly the subject of unbridled legislative interference, as if they were the mere creatures of sovereign authority. So the idea persisted that the right in question, like the right to inherit and transmit property upon the death of its possessor, was in no sense a natural or inherent right. Such idea has been reiterated over and over again and only been, if at all, doubtingly referred to now and then. The error as to the latter was repudiated by this court in *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627. I repeat what I wrote on that occasion, changed to fit the case. Error has often had the most distinguished of supporters. If it were true that error could be sanctified by mere weight of numbers or ability of its advocates, and given the character of infallible truth by the mere force of repetition, then the idea that the right to vote is not a right at all, except in the sense of a creature of law; that it has no inherent quality,—would long ago have taken such deep root that no one, much less a court, would hardly venture to make an effort to dislodge it.

Had the all-pervading concept of the Declaration, which

marked the change to our system of constitutional liberty, been from the first given the dignity that it commanded and has latterly received, instead of being regarded as in the nature of a rhetorical embellishment, or a sort of apostrophe to something sentimental rather than real, the very ideas which it was designed to entrench as fundamental law would not have been somewhat lost sight of.

Formerly, in general conception, there were no rights, strictly so called. There were privileges which came, directly or indirectly, by grace from sovereign authority. That was the crowning mischief of the Colonial period which was sought to be removed. Hence, at the start, things essential to our welfare which had been enjoyed, so far as enjoyed at all, as privileges, were claimed as inherent rights, only surrenderable by the people, or subject to limitation by them by fundamental law. There the standard was reared of a new era, one of inherent rights, instead of sovereign graces. To emphasize and make that clear it was declared that all men are "endowed with certain inalienable rights," specifying some, but not attempting to specify them all.

The word "inalienable" was, doubtless, not used in the strict sense, because some rights referred to were commonly parted with or modified by consent. Appreciating that, doubtless, in most constitutions, ours included, the term "inherent" was substituted for inalienable, to denote, more accurately, the functional character of rights of members of a community in an unorganized state.

That the right, in the beginning, here to participate in governmental affairs by reasonable exercise of the elective franchise, was inherent, within the meaning of the fundamental declaration in the bill of rights, seems pretty plain. Not inherent in the sense of inalienable and inseparable from the individual. Not natural in one view, but, inherent in the same sense as the right of self-defense and the right to acquire, hold, and transmit property are. Thus, it is conventional in the

sense other rights are which are in their nature absolute till surrendered or limited by consent, express or implied. It is not natural in the sense that it is so absolute and functional as to be inseparable and not surrenderable. This court has before classed the right to vote as above indicated. *Koerber v. Patek,* 123 Wis. 453, 102 N. W. 40. That was done by way of discussion and illustration, it is true; but done considerately, nevertheless.

The fundamental declaration referred to is the substructure upon which our whole constitutional system is bottomed. It breathes the all-pervading purpose of the whole body of fundamental law. Around and upon it are clustered all other things as subsidiary in a complete structure.

So when we come to sec. 1, art. III, of the constitution,—in form granting the right of suffrage to every male person of the age of twenty-one years or upwards, under specified conditions,—it is to be read, in conformity to the general nature of state constitutions; as a limitation rather than a grant, and a prohibition as to all persons not recognized as falling within the limitation. *Expressio unius est exclusio alterius.* This general idea that the grant, in form, is really a limitation to one class and a prohibition to all others, conventionally agreed to in the formation of the government, has been many times judicially asserted in connection with the idea that the right to vote is not a natural right, but is a conferred right; the real logic of the whole being that, in so far as the right is constitutionally confined to a class, it is a created right; *People v. Pearce,* 27 N. Y. 45; *People v. Baker,* 48 Hun, 198, a right created by the people as a whole, acting fundamentally; exercising the function which is inherent in the people as a whole to limit, at least some rights, in their nature, inherent in the individual, especially that which, for the benefit of the whole, must be subservient to the right of society to conserve and promote the general welfare.

So the right to vote is one reserved by the people to members of a class and as so reserved, guaranteed by the declaration of

rights and by sec. 1, art. III, of the constitution. It has an element other than that of mere privilege. It is guaranteed both by the bill of rights; and the exclusive entrustment of voting power, contained in sec. 1, art. III, of the constitution; and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses,—constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations, as this court has often held. *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *Koerber v. Patek,* 123 Wis. 453, 469, 102 N. W. 40; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 521, 107 N. W. 500; *Nunnemacher v. State,* 129 Wis. 190, 230, 108 N. W. 627; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137.

Thus is given the right to vote a dignity not less than any other of many fundamental rights. So it has been rightly said by judicial writers, "It is a right which the law protects and enforces as jealously as it does property in chattels or lands. . . . The law maintains and vindicates" it "as vigorously as it does any right of any kind which men may have or enjoy." *State v. Staten,* 46 Tenn. 233, 241. It is commonly referred to as a sacred right of the highest character and then again, at times, as a mere privilege, a something of such inferior nature that it may be made "the football of party politics." We subscribe to the former view, placing the right of suffrage upon the high plane of removal from the field of mere legislative material impairment. It has been not inaptly characterized in these lines:

> "A weapon that comes down as still
> As snowflakes fall upon the sod;
> But executes a freeman's will,
> As lightning does the will of God."

Giving to the right to use the elective franchise its proper ignificance, it is yet subject to regulation like all other rights.

That, inherent therein, exists a right of persons to combine according to their political beliefs, and right, so far as not reasonably prohibited by law, of each group to possess and use freely all the machinery for increasing the power of numbers by acting as a unit—over the power acting individually, to effect a desired political end,—goes without saying. This, and all other courts which have dealt with the matter, have so declared, and recognized that political parties with freedom of action, as broad as freedom of use of the elective franchise, to the end that the public welfare, for which governments exist may be best promoted,—are essential to our form thereof. This court, in spirit at least, fully indorsed in *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961, this declaration of the supreme court of California:

"No one can be so ignorant as not to appreciate the value, indeed the necessity, of opposing political parties in a government such as ours. . . . No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government, and needs no expression in its constitution." *Britton v. Board of Elec. Comm'rs,* 129 Cal. 337, 61 Pac. 1115.

The rights involved, however, said the court in effect, are within the constitutional guarantees, state and national. "Self-preservation is the right of political parties as well as individuals." Freedom to do those things reasonably appropriate to the effectual maintenance of party organizations; and use thereof to accomplish legitimate party ends,—cannot be abridged any more than can the right to vote. The limit of legitimate interference, as to the latter, is necessarily the limit as to the other, so far as the question of power is concerned.

There is nothing contrary to the foregoing in *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482. True, the court there said that the thing guaranteed by the constitution is the individual right to the individual choice, by vote. "Mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care. It deals with the individual right to vote. . . . If that be not impaired and reasonable opportunity be furnished for equal representation on the official ballot," that is sufficient. In using that language the court was addressing itself to the situation in hand. One where opportunity was afforded for full efficiency of party organization and party representation upon the official ballot so far as principles were concerned. The idea was, whether the legitimate purpose of party organization being fully satisfied, the full right being accorded, which we affirm now is incidental to the right to vote, does the latter right have the further incident of inviolability, because of some constitutional limitation upon legislative power, or mere party sentiment, so that after enjoying the right of one party characterization upon the official ballot, indicating adherence to some distinguishing political policy, a person may, as matter of constitutional right, and because of association for mere sentimental or selfish reasons, demand a second such characterization by another body, to gain favor, regardless of the legitimate purposes of party organization; that of promoting and vitalizing policies, rather than individual selfishness. True, as held in the *Runge Case,* only such interference with the right to use of the official ballot for party purposes as invades, destructively, opportunity to use the elective franchise to further legitimate ends of party existence, are within the inhibitions of the right to vote.

It has become elementary that constitutional inhibitions of legislative interference with a right, including the right to vote and rights incidental thereto, leaves, yet, a field of legis-

lative activity in respect thereto circumscribed by the police power. That activity appertains to conservation, prevention of abuse, and promotion of efficiency. Therefore, as in all other fields of police regulation, it does not extend beyond what is reasonable. Regulation which impairs or destroys rather than preserves and promotes, is within condemnation of constitutional guarantees. So it follows that, if the law in question trespasses upon the forbidden field, it is only law in form.

It is further elementary that, the extent to which the legislature may go in the field of police power, is primarily a matter for its judgment. As to the case in hand, the same as others, it could not properly go beyond reasonable regulation. However, what is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. Such review does not have to do with expediency. It only deals with whether the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness, all fair doubts being resolved in favor of the proper exercise of lawmaking power.

In the exercise of police power two questions are involved. *First.* Is the purpose legitimate? *Second.* Are the means employed to effect the purpose legitimate? If the former be legitimate and the latter reasonably adapted to effect the former, the law is entitled to judicial approval, otherwise not.

The first essential mentioned is wholly within the judicial field. That is, whether a legislative effort has relation to a proper subject of police authority, the court must decide. True, such a degree of care to avoid unduly putting up a barrier to the exercise of lawmaking power, is to be used, as not to raise the standard of constitutional prohibition in any doubtful case. The second essential, as suggested before, is particularly legislative discretion. So the range of methods of interference is necessarily as broad as the uttermost boundaries of reason. Abuse of discretion so clear in the field of fact as

not to be fairly justifiable, is necessary before the legislative action can be condemned as usurpation. That has been so often treated in this court as to be deemed elementary.

The foregoing leads up to the question, peculiarly, as said, within the judicial field, viz.: Was the purpose of the act in question legitimate?

It was not supposed that there was doubt but what party representation upon the official ballot is a proper subject of police regulation. Granted, as we do, that the right of such representation exists and that it is within constitutional guarantees as necessarily incident to the right to vote, it was thought that the incidental matter, as well as the primary one, was not independent of reasonable legislative control. Counsel for plaintiff do not seem to insist to the contrary; contenting themselves with contending that the manner of regulation is destructive. But, it has nevertheless been suggested that the right of regulation does not extend to discriminating between political organizations in respect to their use of the ballot, according to significance in membership; especially so far as to make the party vote at one election for a particular candidate a standard by which to measure sufficiency of party membership, as evidenced by the showing at the succeeding primary,—to entitle the favored party candidates at such primary to party location upon the official ballot at the succeeding election; thus affording party use of the ballot to some organizations with the obvious advantage of facilities for team work and denying it to others. The idea is that a party organization, however small, representing principles fairly differentiating it from others, is entitled, as matter of constitutional right, to equality with any other, however large, as regards use of a party ballot.

The idea suggested, should it prevail, would, in all circumstances, nullify any legislation affording a different use of the ballot to some political organizations than to others. It is a radical proposition which has not been passed without consid-

eration. It is by no means without merit. It is difficult to escape the conclusion, if it can be done at all, that the right to vote, being, as has been said, as sacred as any other right,—and in some respects more so, since the safety of the latter is dependable upon the former,—its free and efficient exercise by party combinations should no more depend upon the significance of the latter as to membership, so long as it has a substantial good-faith existence, than should property rights depend upon station or wealth; that the absolute equality which is equity should apply to parties as well as individuals in the ordinary relations of life.

That doctrine is not without its attractiveness. It makes a strong and disturbing appeal to the conscience and the reason of the writer and his ideals of a people's government of their own creation as enshrined in our constitutional system. The standard of fundamental liberty and equality which I believe to have been planted in such system, as to the time-honored method of promoting and vitalizing cherished governmental policies by party organizations, and party efforts, and party methods of party representation upon party ballots, I would not voluntarily lower any more than I would consciously violate my oath of office. Whether legislation has not in some cases, and whether it has not in this case, endangered, if not lowered that standard, admits of doubt. I say this for myself alone.

In considering the question of whether there may properly be limitations of some sort to party enjoyment of a party ballot, we must face the fact at the outset, that the use of an official ballot, the so-called Australian form, containing all parties as well as individual or independent appeals to the favor of voters,—has been generally recognized as fundamentally right. The contrary is not claimed by counsel for plaintiff and is not claimed, as I understand it, by any member of the court who disagrees with the majority. On the question of whether ballot reform did not go too far in preventing politi-

cal parties from having the benefit of a separate party ballot, I have never been free from doubt. However, at this late day, after compulsory use of the Australian form has been approved or submitted to as proper in nearly every, if not every, state of the Union, it is too late to suggest, with confidence, to the contrary. Such an invasion of the free use of the ballot as enjoyed at the time our state constitution and most state constitutions were adopted, was a most radical departure from the custom of the country, which had existed for about a century. That it was adopted in the foreign country of its origin, and has been substantially in like countries, having no written constitution, is easily understood. How it came to be so easily entrenched in the system of this country, with its manifest interference with political liberty, is not so easily understood. But we are face to face with a condition which has so strongly stamped the prevailing ballot system as proper, that it is too late to question it. Universal practical construction and usage sanctions it, and most states, including our own, have judicially, expressly or impliedly, done the same.

In view of the foregoing it has commonly been thought that some test of party capacity, having reference to numbers, for representation on the official ballot is necessary. Otherwise the number of parties and names of candidates might be so great as to render the single ballot sheet unsuitable for exercise of the constitutional right to vote. As we understand it, counsel for plaintiff concede this and cite cases to that end. Nevertheless we are led not to pass over the subject without attention, because of questions raised here. This branch of the case, it seems, is not open to fair controversy, if we may properly consider the door closed by decisions elsewhere. In *State ex rel. Hagendorf v. Blaisdell* (N. Dak.) 127 N. W. 720, it was very recently decided that a legislature may, within reasonable limits, determine how many voters, acting together for the purpose of making nominations, shall be entitled to a party ballot. The court reasoned that otherwise

any number, however small, could organize a party and demand use of the recognized equivalent on the official sheet of a single party ballot, thereby rendering it probable that parties would often be so numerous as to necessitate a sheet so extensive and complicated as to render it practically unintelligible and confusing and on that account, destructive of the right to vote itself, instead of simplifying and regulating it. That seems quite plain from a practical standpoint. If there be any infirmity therein, it strikes at the idea, itself, of the combination official ballot. The reasoning of the North Dakota court voices the common judicial thought. We refer to it, specially, because of its being the most recent contribution. Statutes and decisions elsewhere, so numerous that we will not venture to cite them, are to the same effect. In no case, so far as we can discover, has the principle been condemned. The regulation has often been challenged on account of its being excessive, but, as a rule, unsuccessfully.

It follows, logically, that the legitimacy of legislative regulation, in the field under discussion, must be tested with reference to appropriateness of ends sought to be attained and also of means to such ends. We would not venture to suggest all the ruling ideas which the legislature indulged in, but several, it is thought, are quite plainly apparent, including the one already suggested, and as regards minor districts as well as the state at large, as we will argue a little later on.

Looking at "the surrounding circumstances," the "existing condition of things," "the evils to be remedied" or prevented, "the objects to be attained," the history of the particular subject, the recognized importance to the public welfare of opposing political parties representing differing governmental policies with such high degree of fidelity of membership to principles as to incline them to promote principles rather than mere personal ends, and of electors intelligently and conscientiously using their valuable constitutional right as well as possessing it; these three purposes stand out in bold and unmis-

takable significance: *first,* to keep the ballot within a reasonably workable compass, both from the standpoint of the party and of the individual; *second,* to promote such party integrity on the only legitimate basis for legal conservation of party existence, as to discourage electors, claiming to belong to one organization, from invading the primary of another; *third,* to stimulate exercise of the right to participate by voting in the activities of the social state. We will treat each subject, giving primary importance to the first.

That a legislative minimum of political significance to entitle a party to a special place on the official ballot, is necessary to keep, so far as practicable, the ballot sheet within a workable size, as before suggested, seems not to need vindication by argument. Conceding that, then, clearly, such minimum should not be so large nor of such character as to unreasonably prevent the formation of new parties, or necessarily tend to afford one of substantial character, as to numbers, less opportunity for efficient existence or competition for the favor of voters at large, than any other, however large, by reason of inequality of capacity to use a party ballot. Such inequality of right, as we have seen, would, of itself, be a fatal interference with fundamental rights. Likewise would such interference with reference to relative significance as to materially impair the essentials of equality of opportunity; so long as it operated to exclude the smallest party of substantial membership and significance from enjoying the party ballot, or the smallest group of electors, rightly regardable as of substantial significance as to numbers, from forming and efficiently maintaining a party organization, and to that end competing for public favor by party candidates presented on a party ballot, as by having its special party column on the official ballot sheet. All that is contended for on behalf of plaintiffs. The principle itself meets with our unqualified approval. Citations in support thereof from other jurisdictions are unnecessary. We deem it to be elementary. Any

suggestion to the contrary in other jurisdictions would not influence this court to invade it.

Assuming, for the time being, that restrictions upon the liberty of party candidates for office for the respective election districts voted for at the primary to have their names placed on the official ballot, fairly and substantially, promote restriction of the general election ballot sheet, to a reasonable compass, which was doubtless the legislative idea,—is the minimum of representative party significance, written into the law of 1909, excessive?

How large the membership of a political party organization should necessarily be, as regards a particular election district, in order to be fairly regarded as substantial, and how long such organization should at least have existed before it can fairly be regarded as having substantial existence as to the respective election districts; are questions of much difficulty. For that reason the range of legislative discretion is necessarily large; and the boundary between the unreasonable and the beyond room for fair doubt, and the extent of the region of mere doubtful; is not easy to discover.

In the judgment of the writer, the somewhat neutral ground in this instance was invaded by the legislature. In the extreme to which the act goes, the lawmaking power traveled beyond the line of danger. Whether they did not even traverse the region thereof and beyond into the field of fatal impairment of sacred rights, I do not consider free from difficulty.

The law, as we have seen, makes an aggregate of votes cast at a primary for all candidates for a particular office in a particular election district, equal or more than twenty per cent. of the total votes cast in such district for the party's nominee for governor at the preceding general election,—the standard by which to test substantial party status. It assumes that if party fealty does not so persist, or exist, as to efficiently move an elector in any district to record his vote at his primary, he should not be counted in determining such status. Is that

manifestly unreasonable? It is to be noted that the percentage, taken as a standard for comparison in a district, is not the total vote formerly there cast for governor; only the vote cast for the party nominee, whether successful or not. That, in general, would be a very small percentage of the total vote. If a party cannot thus show the existence of at least one fifth of its former significance, should it be regarded, beyond reasonable doubt, to still have substantial existence? That is the question.

Some standard of comparison is certainly necessary. That is the logic of every situation to be measured. As principles are not supposed to spring up or pass out of existence suddenly, or, in general, to be momentarily the basis of worthwhile political organizations, but to yield slowly to new conditions having naturally a considerable period of development into recognizable materiality, and applying differently, but changing slowly in that regard, to changing importance of old conditions; a party vote in the state at large would seem not to be an unfair point of view from which to view the field, and the party vote for the office most likely to indicate the maximum of party members not to be unfair as a basis from which to determine the unit of measurement. Can the party membership, so far as represented by its candidate for any particular office in an official district, fall below one fifth of such maximum and still be said to persist as a substantial organization of such significance as to numbers, as regards such district?

If the questions suggested were to depend on the general trend of analogous legislation and judicial approval elsewhere, they would have to be resolved in favor of the law before us. In *State ex rel. Hagendorf v. Blaisdell* (N. Dak.) 127 N. W. 720, a numerical test to entitle an organization to a party ballot and name party candidates, equal to five per cent. of the total vote for all candidates for governor at the previous general election, was held reasonable. Prior thereto,

in *State ex rel. Montgomery v. Anderson* (N. Dak.) 118 N. W. 22, a law requiring a party's votes at a primary for any election district for all its candidates at such primary for one office, for such election district, equal to thirty per cent. of the same party's vote therein for a specified minor state office, as an essential to such party having a candidate for such office on the official ballot at the succeeding general election,—was sanctioned by a divided court. Since rendering the first decision cited, the same court, by a bare majority of justices, as we understand, in a case not yet reported,—overruled the first case cited. The position of the court may well be considered as not yet having been very firmly established.

In *DeWalt v. Bartley,* 146 Pa. St. 529, 24 Atl. 185, a law requiring a party, in order to have party representation on the official ballot, to have polled ten per cent. of the total vote at the last general election, was sustained. It was said that some such regulation was absolutely necessary, as an accompaniment to the law requiring use of the Australian form of ballot; that the right to vote is an individual right; that the right to nominate is primarily a party right, and necessarily requires, in order to have substantial significance, that there should also be a party of significance, otherwise a few persons could assume to be a party and successfully demand use of a party ballot,—as the Three Tailors of Tooley Street assumed to be the "People of England,"—resulting in the scheme of an official ballot being a failure "as the ballot would become the size of a blanket."

In *Miner v. Olin,* 159 Mass. 487, 34 N. E. 721, a similar law was sustained by the process of reasoning indulged in by the Pennsylvania court.

In *State ex rel. Fitz v. Jensen,* 86 Minn, 19, 89 N. W. 1126, a law was sanctioned requiring a political party to poll ten per cent. of the total vote, at one general election, in order to have a party place for its candidates on the official ballot at the succeeding general election.

We might continue at length citing foreign statutes and decisions sustaining legislation, similar, as we think, to the law in question. In most of them, it is true, the regulation evidenced is of a milder type than that in the law under consideration. In all, constitutional limitation of such interference is conceded. In only the one case cited has a law somewhat similar to ours been condemned as to the particular feature now vital. We have endeavored to examine all such laws and the adjudications with reference thereto, with the result that, in every instance of a regulation of the nature of the one in question, it was recognized as not only proper but necessary. No act elsewhere is precisely like ours, or near enough thereto to furnish a precedent, except as to principle. In that respect the acts and adjudications speak harmoniously in support of the regulation.

So it will be seen that precedents are wanting as to the precise question under discussion. Really, precedents could not well be helpfully controlling under the circumstances. The question must be decided on principles applied to the peculiarities of our own law. In that respect we are unable to conclude either that the basis for measuring party significance at the election preceding the primary, or the basis for measuring its significance *in præsenti,* is so manifestly destructive of party integrity and individual rights to efficiently participate in collective political effort, as to be fatal to validity. Here again I feel constrained to record my judgment that the legislature traveled upon dangerous ground in going as far as it did.

We cannot doubt but what the particular feature of the law under discussion was thought by the legislature to be means of promoting reasonable restriction of the size and complications of the ballot sheet. It may well be thought that such idea was the dominant one. It has been suggested that it was such; that it is illegitimate because it will not promote the end in view at all; as does a law providing that a political party

shall not be entitled to a party ballot place on the official election ballot sheet at any election unless it polled at the previous general election a specified percentage of the total of votes. Therefore the latter situation and the statutes and decisions in that regard to which we have referred, are said not to have any analogy to the situation we are dealing with.

The position last indicated is not so free from difficulty that we can well pass it without serious attention. From the viewpoint of party solidarity for the state, only, one may reasonably come to the conclusion suggested. But we must face the condition the legislature had to deal with. A condition respecting political parties, not so important from the standpoint of minor official districts, as from that of the major thing; the state as a whole, yet one which could not be abolished by the legislature.

The condition above referred to is that, in general, a political party is made up of units down to those severally composing the smallest official district each of which, while forming part of a state-wide organization, has an individuality of its own. A political party of the state, as a rule, means a like party for each congressional, senatorial, and assembly district, and for each county, town, city, and village. Whether these minor individualities, for mere local purpose, though having very much less of the importance, or, generally, none thereof, which make state and national parties proper subjects of legal protection, in that the latter only have to do with shaping of public policies; might well be a very fruitful source of expanding the official ballot sheet beyond all reason,—the legislature undoubtedly thought so. It would not be our province to condemn its judgment in that regard unless it appeared to be manifestly wrong. But on this, with due deference to the views of those who think to the contrary, we do not regard it as involved in the region of doubt.

A regulation restricting use of a party place on the official ballot to the local party unit, according to whether the organization, locally, has a legislative minimum of significance,

tested by the showing at the last previous election, regardless of whether the major party for the major purpose has the requisite status for recognition or not; is not, by any means, unknown. *People ex rel. Dickerson v. Williamson,* 185 Ill. 106, 56 N. E. 1127.

It must be remembered that party existence does not cease merely because the party at a particular primary election does not cast votes enough to elect a candidate with competency to have his name placed on the official ballot at the succeeding election, as its duly elected candidate for governor. The way is still open to the party to secure a place for its candidate with his party designation, and if he receives, at the election, one per cent. of the largest vote for his party for presidential elector at the last preceding presidential election, that will give the party the requisite status to compete at the next primary for a party place on the succeeding election official ballot. Thus it will be seen, representation on an official ballot at one general election by a party column filled with party candidates, is not necessary to continued party existence. The law provides that "Any political organization which at the last preceding general election was represented on the official ballot by either regular party candidates or by individual nominees only," may have recognition as a party on the official ballot at the next primary in any district—where "any of its candidates or individual nominees received one per cent. of the total vote cast at the last preceding general election"—by complying with the ordinary conditions. Ch. 451, Laws of 1903. This we may say, in passing, is a fairly good answer to the suggestion that there is no way of forming a new political party under the present system. It will be seen that not only is there a way for the creation of party status without pre-party representation in a special column on the official ballot, but a way by which a very small showing of strength at one election will create capacity to compete for all the advantages of a party ballot at the next primary and the next general election.

If the disposition thus made of what seems to have been the

dominant idea of the legislature and the supposed effective answer thereto were not sufficient to hold the balance in favor of the law, the second purpose we have suggested adds weight thereto. We must view that in the light of the fact that the primary election was designed to be, so far as the party is concerned, an election of candidates, something more than a mere unofficial naming of candidates as under the convention and caucus system. The result of the election, as regards the party, is to give the favored persons *quasi*-official status. *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628. The law, by use of the term "election" as well as the whole framework and purpose of it, indicates, unmistakably, that it was designed to give greater dignity to the result than formerly; to give the election of candidates a somewhat controlling effect upon the final choice of public servants. Such is the logic of *State ex rel. Rinder v. Goff, supra.* It is at the primary more than at the election, under our system evolved from the practice of a century commencing with the caucus and convention system in the most primitive form; that the policy of the government is determined upon, as well as the instrumentalities which shall vitalize it. So, as has been said by many judicial and other writers, political parties have become so potent "in determining the measures and in administering the affairs of government that they are regarded as inseparable from, if not essential to, a republican form of government." *Ledgerwood v. Pitts,* 122 Tenn. 570, 593, 125 S. W. 1036. It is in the hands of parties that the determination and the administration of policies has drifted, as naturally as the delicately suspended and balanced needle turns to the pole. It is in such hands that such power will rest by the very logic of our social state. Idealistic efforts to change this may momentarily disturb the equilibrium of natural conditions, as a stone cast into the placid pool disturbs its surface; but as certainly in the one case as in the other, the disturbing cause will sink out of sight and things will resume their natural state.

The legislature and all legislatures which have dealt with this subject, have viewed it on that plane and, from such point of sight, appreciated the importance of party integrity and purity to the public welfare, and, to that end, of making, as part of the regulating machinery, some efficient provision for each person voting a party ticket at a primary making a party choice at that time, or there evidencing good-faith affiliation with the party he then assumes to be a member of. Legislation of that kind of a more or less severe character has been sustained on many occasions. *Ledgerwood v. Pitts,* 122 Tenn. 570, 594, 125 S. W. 1036; *State ex rel. Labauve v. Michel,* 121 La. 374, 46 South. 430; *Morrow v. Wipf,* 22 S. Dak. 146, 115 N. W. 1121.

One of the most significant cases of condemnation of a primary election law as unconstitutional, was because of its not providing safeguards against members of one party invading the primaries of the other. *Britton v. Board of Election Commissioners,* 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. With our common knowledge of the intensity of interest which members of a party take in maintaining its importance before the people, it is not difficult to see that the menace of not having the party ticket on the official ballot, in the absence of a specified showing of strength made at the primary, would naturally be very forceful in preventing them from violating their party faith for the time being, quite as efficiently to the desired end, if not more so, than many of the regulations to such end found in the various statutes on the subject. It may be that this particular purpose, itself, might be a sufficient reason for not condemning the law as manifestly unfair.

The third minor province of the regulation law; that of stimulating exercise of the elective franchise at the primary, is entitled to much weight. This again might, itself, be sufficient to at least place the validity of the law in the realms of doubt and save it from judicial disapproval.

The trend of constructive thought is in the direction of stim-

ulating use of the elective franchise. Inherent in possession of the right, with its constitutional guarantees, is the duty to exercise it. The public welfare requires performance of that duty. Penalties or advantages to secure such performance have been suggested. What more practicable stimulus to individual effort, after passing menace of pecuniary loss or deprivation of rights, than danger of loss of local party status as regards the official ballot. What more efficient aid in stimulating individuals to perform their duty to vote than organized efforts of the political parties to preserve their effective existence. "Self-preservation is the first law of nature." That maxim applies as well to political parties as individuals.

So we need not, necessarily, rest the law upon the legitimacy and sufficiency of what may have been the dominant legislative reason for it. Lay that aside, if we may, though we think we cannot, yet, we cannot condemn the law within the rules governing the subject. Taking the three reasons discussed, and it is not unreasonable to suppose there may have been others, in legislative contemplation, we can well say that the extreme of legislative discretion was not overstepped.

All objections to the law suggested by counsel or in our consultations we have endeavored to treat. The idea that the purpose of the law was not regulative, but was to destroy minority parties, retard or prevent formation of new parties, and promote the supremacy of the one in power *in præsenti,* has not passed without notice. True, no law should be spread upon the statute books by the force of one party because of its happening to be for the time being in control, having the semblance, from any fair viewpoint, of perpetuating its supremacy, or materially interfering with the good-faith organization and efficient existence of any other party composed of a substantial number of citizens, or which will necessarily or materially have that effect. If the ostensible purpose of the law of 1909 were manifestly not its real purpose, it would emphatically meet with judicial disapproval. In case of serious

doubt as to whether a regulation is excessive,—as I think there is here,—manifested by history of administration of it, though I do not entertain doubt but what the law was conceived in good intentions,—notwithstanding the court cannot supply a remedy, because of there being at least a reasonable doubt in favor of enacting it,—should have the attention of the department of government which can supply one.

This does not need to be closed by a formal order for judgment sustaining the demurrer and dismissing the complaint as such order was made following an announcement of points decided in advance of the preparation of this opinion.

The following opinion, entitled both in the case of *State ex rel. McGrael v. Phelps* and in that of *State ex rel. Hanna v. Frear* (see *post*, p. 58), was filed December 14, 1910:

TIMLIN, J. (*dissenting*). These are two actions commenced in this court under the original jurisdiction thereof to require the names of relators to be placed in the Democratic party column upon the official ballot at the ensuing election, notwithstanding the requirements of ch. 477, Laws of 1909, alleged to be unconstitutional. One of the actions is for a writ of *mandamus* against the secretary of state, the other against the county clerk and the board of canvassers of Milwaukee county. They may be considered together.

I readily agree with the majority of the court that—

"The declaration of rights contained in sec. 1, art. I, of the constitution is a prohibition, by necessary implication, of legislation inconsistent therewith."

"The right of suffrage includes the right of voters to separate into groups according to their political beliefs respecting governmental policies, and the right of every group to organize and have all the machinery in that regard not reasonably prohibited by law for making the organization effective as regards declaring the policy of its members, and vitalizing such policies by electing officers in harmony therewith to legislate and execute law to that end."

"Every legislative interference with freedom on the part of voters to form political organizations and to act under their chosen party names to accomplish the purposes of the organizations, is at the same time an interference with the right to vote, so the limit of [legislative] power as to the one is substantially the limit of [such] power as to the other."

"The office of regulation of the right to vote and the rights incident thereto being to conserve and promote efficiency, any so-called regulation which goes clearly beyond the boundaries of conservation into the field of impairment or destruction, is unreasonable and inhibited by the constitutional guaranty of the rights of suffrage and [the] inhibition of interference with inherent rights."

If the decision of the court were in conformity with these declamatory statements there would be no occasion for this dissent. The actual disposition of the case, however, tends to subvert rather than protect these rights. I am not one of those who believe that the perpetuity or solidarity of any particular political party is essential to free or beneficent government. At the same time a political organization in which electors of common political belief mass themselves in favor of or against some man or measure is in a populous republic necessary to the full and effective exercise of political power by the people. In this sense "party" is desirable and necessary. It is only in the crudest form of representative republican government that the electors vote merely for men. It is only the most ignorant and undesirable vote that is given merely from motives of personal loyalty to a chief. The way of progress is in the direction of voting for or against measures rather than men. In the great enlightened countries of the world this is accomplished by the institution of a responsible ministry representing the political party in power. This ministry proposes legislation, and the legislators in voting thereon pass quite freely from one party to the other according to their views on the proposed measure. If the differences are serious and the party in power is defeated the parliament is dissolved and the parties go to their constituents upon the merits of the proposed law. This law is thoroughly discussed by the candi-

dates, in the press, and by and with the electors, and votes for these candidates are given or withheld on the merits or demerits of the proposed law. This presents a sort of referendum which can only take place in respect of measures serious and far-reaching enough to divide the party in power, and is the outgrowth of experience and admirably adapted to that purpose. Our American system is different. But the same tendency to vote for measures or principles, although somewhat less effective, is apparent here in the construction and promulgation of platforms by the political parties. When platform declarations came to be considered less binding, this tendency manifested itself in the doubtful expedient of the executive assuming the role of premier of his party and negotiating, inducing, and compelling legislation by an exercise of executive power conferred upon him for an entirely different purpose. It also manifests itself in the great and widespread demand for the referendum and recall. This incident of effective exercise of the right of suffrage consists of combination among voters and the selection of candidates pledged to a particular governmental policy or measure. To deprive some part or fraction of the electorate of this power is to encroach upon and seriously impair and even to destroy the voter's right to make his vote effective by such association with others of the same political belief in favor of those men whose adherence or loyalty to the measures in question is known or stated in party platforms or otherwise. To allow one party of the electors to make their votes thus effective and deny this right to another because the latter party is small is to create a condition of political inequality. This condition cannot be lawfully created except from necessity and in cases where the political group is so small as to be negligible. The power of the legislature to adopt reasonable regulation of the exercise of the right of suffrage is not questioned, but:

"All regulations of the elective franchise, however, must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the con-

stitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void." Cooley, Const. Lim. (7th ed.) 907, 908.

Does the legislation in question unnecessarily impair the exercise of the elective franchise on the part of any voter? In order to examine this question we cannot confine ourselves solely to the act of 1909, because the effect of that statute as impairing the efficient exercise of the right to vote is accentuated by other statutory requirements.

First, in order that a candidate for office have his name placed on the official ballot in the nominating or primary election he must file with the secretary of state or county clerk, as the case may be, a nomination paper in a prescribed form and signed within a stated time; if he is a candidate for a state office, by at least one per cent. of the voters of the party of such candidate in at least each of six counties in the state and in the aggregate not less than one per cent. nor more than ten per cent. of the total vote of his party in the state; if for a representative in Congress, by at least two per cent. of the voters of his party in each of at least one half the counties of the Congressional district and in the aggregate not less than two per cent. nor more than ten per cent. of the total vote of his party in such district; if for an office representing less than a Congressional district in area or a county office, by at least three per cent. of the party vote in at least one sixth of the election precincts of such district and in the aggregate not less than three per cent. nor more than ten per cent. of the total vote of his party in such district. These percentages are to be computed upon the party vote for the presidential elector receiving the largest vote at the last preceding presidential election. The nomination paper is required to contain a declaration on the part of each signer that he intends to support the candidate named therein. After these nomination papers are filed, notice of the primary or nominating election is given and an official ballot is printed at public expense for use in

such primary election, with the names of all candidates for whom party nomination papers have been filed printed therein. No other ballot is permitted. The form of ballot is provided for by statute, and although spoken of in the statutes as the "ballot," it consists of several tickets, one for each political party with the name of that party at the head. These are all fastened together. The words of this statute should, perhaps, be here quoted:

"At all primaries there shall be an Australian ballot made up of the several party tickets herein provided for, all of which shall be securely fastened together at the top and folded, provided there shall be as many separate tickets as there are parties entitled to participate in said primary election." Subd. 3, sec. 11—12, Stats. (Supp. 1906: Laws of 1903, ch. 451).

There is no ticket for a new organization which cast no votes in the county or precinct for presidential electors at the last presidential election, neither is there any ticket for an existing party which had no presidential nominee and which has polled no such vote at the last presidential election, or which had such candidate but polled no vote for presidential electors in the county or district. The elector is handed this ballot consisting of several tickets, and he selects one of the party for whose nominees he intends to vote and returns the others to the inspectors. The elector must vote this ticket or not at all, except that he may write in a name instead of the printed name; but if he should in doing so insert the name of one who is a candidate for the same office on another party ticket, his vote would be counted for such person only as a nominee of the party on whose ticket it was written. Superadded to these stringent requirements is ch. 477, Laws of 1909, which provides:

"1. If all candidates for nomination for any one office voted for on any party ballot *shall receive in the aggregate twenty per cent. or more of the vote cast for nominee of such party for governor at the last general election,* the person re-

ceiving the greatest number of votes at such primary election as the candidate of such party for such office, shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election." Subd. 1, sec. 11—18, Stats.

"2. If all the candidates for nomination for any one office voted for on any party ballot *shall receive in the aggregate less than twenty per cent. of such votes so cast at such last general election,* no person shall be deemed to be the party nominee for such office, but the person receiving the greatest number of votes at such primary as the candidate of such party for the office shall be deemed an independent candidate for such office, and his name shall be placed on the official ballot in the column of individual nominations and he shall be denominated in such column as 'independent.'" Subd. 2, sec. 11—18, Stats.

The ballot last referred to in subd. 2 above is the official ballot required to be used at the general election which follows the primary or nominating election. Individual nominations may be made by nomination papers signed and filed by a prescribed percentage of the electors, but this is aside from the primary election, and no political party as a party can make such individual nominations. The form of the official ballot to be used at the ensuing general election is also provided for, and no other can be used. This contains as many party columns as there are political parties receiving the requisite number of votes at the nominating or primary election and also a column for independent candidates. The elector may at the general election vote the whole party ticket by making one cross at the head of the column, or he may make a cross or mark after such names on the ticket as he wishes to vote for, and he may in this way vote for part of the candidates of one political party and part of another. But no pasters are allowed on the ticket or counted as votes. The names of persons nominated otherwise than at the primary election are to be placed in one or more columns designated "independent." But these must necessarily be voted for sep-

arately. They represent on the ticket no common principle or policy: one may be a socialist, one a prohibitionist, one a mere independent office seeker, and so on.

Before considering in detail the defects of the statute in question (ch. 477, Laws of 1909), it is well to consider the foundation precedents and the reasons given for supporting the constitutionality of the laws first above referred to requiring the percentage of the vote there stated in order to obtain a place upon the official ballot.

In *DeWalt v. Bartley,* 146 Pa. St. 529, 24 Atl. 185, 15 L. R. A. 771, a requirement of three per cent. of the entire party vote cast in order to entitle the nominees of that party to a place on the official ballot was upheld. It was said:

"The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names shall be printed on the ballots. . . . It follows, if an official ballot is to be used, nominations must be regulated in some way; otherwise the scheme would be impracticable, and the official ballot become the size of a blanket."

In *Ransom v. Black,* 54 N. J. Law, 446, 24 Atl. 489, 1021, 16 L. R. A. 769, justifying a similar requirement of five per centum, it was said:

"Now, the plan of providing official ballots, which plan is the keystone of the secret ballot system, involves necessarily some limitation upon the number of party tickets and the number of party candidates. . . . If it was left in the power of each voter, or each coterie of three voters, to adopt a party name and demand that an official ballot should be printed at public expense, and distributed to each voter at the polls, the polls would probably be littered with ballots 'thick as autumnal leaves that strew the brooks in Vallombrosa.' Great expense, labor, and inconvenience would result, without any appreciable benefit to the voter or to society. These regulations may not be the wisest that could have been adopted, still they are regulations which do not seriously impair the right of any citizen to vote. They are intended to restrict the number of

party tickets within reasonable limits, while, at the same time, permitting any body of citizens whose number is sufficient to give importance to a concerted political movement to organize as a party."

In *State ex rel. Plummer v. Poston,* 58 Ohio St. 620, 51 N. E. 150, 42 L. R. A. 237, it was said of a similar requirement:

"Some restriction upon the right to have nominations printed upon the blanket ballot is necessary to render it practicable. In view of the small ratio of voters required to make a certified nomination, and in view of the right to have nominations made by papers or petitions signed for that purpose, and of the right conferred by the act upon every voter to supply the names of all persons for whom he may desire to vote, we cannot say that the exercise of the right is unreasonably impeded." From this one of the ablest members of the Ohio bench dissented.

See, also, *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482, following the foregoing cases.

In *State ex rel. Webber v. Felton,* 77 Ohio St. 554, 84 N. E. 85, where the fraction required was ten per cent. and exceeded largely the percentage required in any of the preceding cases, the court said:

"One man cannot constitute a political party; and the abuses that it was intended to prevent depend largely upon the number of those who constitute the party, and this makes it perfectly proper for the legislature to limit the application of the law according to number. The Australian ballot laws limit the party tickets that may appear on the printed ballot, by a percentage of the vote cast at a previous election, and in nearly every case in which objection has been made on that ground such laws and legislation have been upheld."

This was said in a suit to enjoin the state supervisor and inspector of elections and others from incurring any expense in the preparation for and holding of a primary election and from holding such primary election. In all the statutes considered in the foregoing cases there are also, I think, alternative provisions for placing a party candidate on the official

ballot. In the following cases it was held that a statute which prohibited the election of delegates to the convention of a political party representing less than a designated percentage of the vote cast at the last election was unconstitutional and void as taking away the right of self-control and self-preservation from a party; that there was involved not a question of reasonableness of the regulation but of the power of the legislature to pass any such law. The law here held invalid required three per cent. of the votes cast by the party at the last election. This power was denied. *Britton v. Board of Elec. Comm'rs,* 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; *Spier v. Baker,* 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; *Murphy v. Curry,* 137 Cal. 479, 70 Pac. 461.

These pioneer cases are cited to show for what reason such statutes were upheld where there was an official ballot and under what circumstances and for what reasons such statutes were held invalid. Under the statutes of this state first above referred to the candidate of a political party must obtain a stated percentage of the voters of his party at the last presidential election in order to be placed upon the official primary ballot. When the legislature has enacted this requirement and, pursuant thereto, the candidate has obtained the required percentage and qualified himself for a place on the official primary ballot, can the candidate be required to procure an additional and increased percentage thereafter to entitle this candidate to a place on the official election ballot? The reasons given for sustaining similar regulatory statutes in the above cited cases would seem to answer this in the negative. The legislature, having acted on the subject and prescribed a regulation to which the candidate must conform, has exhausted its police power of regulation with reference to percentages of the party vote if this power is grounded on the considerations stated in the foregoing precedents. It has fixed what it has considered a reasonable number in order to entitle the candidate to have his name on the official ballot.

Certainly there must be some ground upon which the requirement of a subsequent and increased percentage may be supported; certainly the reason in support thereof stated in the foregoing cases no longer obtains. The official ballot for the general election cannot thus be loaded down with names or parties, because only one candidate of each party for one office can obtain a plurality of votes at the primary, and because no party can have a place on the official general election ballot which is not represented on the primary election ballot. Only three grounds for upholding this statute in question as a valid police regulation are suggested: (1) that the legislature may within limits prescribe the number of votes necessary to entitle a person or party to a place on an official ballot; (2) that the law is or may have been intended for the benefit of the party, because encouraging its members to attend and take part in the nominating election; (3) that the law is intended to prevent the members of one political party dictating the nominations of another. If we grant the first proposition the law will be found invalid, because, although it has been held that some small percentage of voters may be required as a condition of printing the name of a candidate on the official ballot, this is placed on the ground that such requirement is necessary to make the ballot effective and prevent it being loaded down with a multitude of names placed upon it by small negligible groups of voters. But the official election ballot cannot be loaded down in this way with party names, because, as said before, only the one candidate on the primary official ballot who has received the plurality of votes can be placed upon the official election ballot. The regulation must be based on some necessity therefor. This first reason for supporting the act therefore fails. The statute, so far as the first reason for its support is concerned, becomes a mere arbitrary requirement based on no necessity for such regulation, and because it also impinges upon and impairs constitutional rights it is invalid. The statutes in question prior to the en-

actment of ch. 477, Laws of 1909, had already exercised this police regulation with respect to the primary election ballot, and the superadded requirement with respect to the enlarged percentage to be obtained at the primary in order to be entitled to a place on the general election ballot is so useless for the purpose stated and so large as to be a material impairment of the effective exercise of the right of suffrage. If the first required percentage necessary to entitle one to a place on the primary official ballot is reasonable, the superadded requirement of twenty per cent. is unreasonable.

With reference to the second ground of support, it requires an extraordinary stretch of credulity to arrive at the conclusion that this benevolent purpose towards its adversary actuated the dominant party in the passage of the law. But it is unnecessary to speculate on this, because the second consideration is no valid ground for the exercise of the police power. The welfare of party and whether or not a voter will continue to act in that party is for the voter to decide. If development or resuscitation of the party be once recognized as a proper basis for police regulation, that will from thenceforth be the principal care of the legislature. Therefore the statute cannot be upheld on this ground, granting, as we must, that it does to a considerable extent impair the effective exercise of the right to vote.

The third ground of support is insufficient because the act has only a remote and indirect tendency to accomplish this purpose and because it seeks to accomplish this, if at all, by impairing the suffrage rights of those who have not attempted to vote in the party of the opposition as a punishment for those who did so vote or attempt to vote. If this be the ground of support, the statute is for this reason an unconstitutional restriction of their right of suffrage. *Camp v. Rogers,* 44 Conn. 291. Those who go to the primary and vote their party ticket have been guilty of no negligence or breach of duty, and their right thereafter to vote the same party ticket cannot be

limited on account of the negligence or default of others. *State ex rel. Wood v. Baker,* 38 Wis. 71; *Dells v. Kennedy,* 49 Wis. 555, 6 N. W. 246, 381. I also think that, even if we assume the authority of the legislature, the required percentage is unreasonably large and the statute in question invalid on that ground. According to the Blue Book the total Democratic vote for governor at the general election in 1904 was 176,301. In 1906, two years later, it was 103,114, a falling off of more than forty per cent. At the general election of November, 1908, it was 165,977, an increase of sixty per cent. over the vote of 1906. The fluctuations in the vote at the primary election are still more marked. The ratio of the primary vote to the general election vote is subject to still greater changes. Where the minority party has small hope of prevailing in the coming election there will always be a light vote at the nominating election. The law must recognize that thousands are concerned with the problem of existence and have many cares more engrossing than those of politics. To require a minority political party to cast at the primary election twenty per cent. of what was perhaps an unusually large vote cast for the gubernatorial candidate with the aid of independents or by reason of fusion with some other minority party or parties, must in the nature of things often exclude that party thereafter from any place on the official ballot. Where the law has this tendency and there is no imperative reason for the existence of the law, no such encroachment upon the right of suffrage should be tolerated. The only case which I find at all sustaining a similar law is *State ex rel. Montgomery v. Anderson* (N. Dak.) 118 N. W. 22, decided by the supreme court of North Dakota October 2, 1908. The reasons given for this decision do not commend themselves. The case seems to be decided upon the old fallacy that there is some point at which the reasonableness of a number, of a time, of an amount, may be apparent to all, and another remote point at which the unreasonableness thereof may be apparent to all,

and men may differ between these extremes; therefore a tribunal charged with the ultimate duty of determining the reasonableness or unreasonableness of the number, time, or amount should abdicate its function and refuse to discharge this duty out of regard to a determination already made which it is the duty of that tribunal to review. The decision plainly misapplied the precedents it professed to follow and took a fundamentally erroneous view of police regulation of constitutional rights. The dissenting opinion of Justice FISK in the case cited contains the better reason, and the supreme court of North Dakota, while the instant case was on argument, overruled the decision mentioned, and as we understand it adopted the views against the constitutionality of the law set forth in the dissenting opinion of Justice FISK. I thus find the precedent discredited in the place of its origin in the most effective manner, and in its place a precedent advisory to us, it is true, but strong against the constitutionality of the act under consideration. Where a court overrules its own decision on a question of constitutional law it must be strongly persuaded of the correctness of the overruling decision.

With these considerations applying to the law as a whole we come down to an examination of the act in detail. This act of 1909 excludes from the official ballot for the general election as party candidates all persons in all cases where all the candidates on the official primary ballot for any one office received less than twenty per cent. "of the vote cast for nominee of such party for governor at the last general election." If the statute is to be taken literally, it requires each candidate to receive at the primary twenty per cent. of the total party vote for governor at the last preceding election. Because there are 71 counties and 100 assembly districts in this state, few of the counties and probably no assembly district could upon a full poll muster twenty per cent. of such vote. Taken literally, then, the statute is void and unconstitutional on its face. Assuming that the legislature could not have intended

this, we are to search for its intention. Two possible meanings may be found. One that it was intended that the requirement of twenty per cent. should apply only to candidates for state offices; the other that the words, "of the vote of the state or of the county or district in which such person is a candidate," be read into the law following the twenty per cent. requirement so as to qualify or limit the generality of this requirement. But this court has heretofore refused to interpolate words into a statute in order to uphold its constitutionality. *Rogers-Ruger Co. v. Murray,* 115 Wis. 267, 91 N. W. 657. In *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885, where the New York tenement house law was by some legislative oversight so enacted in this state as to apply to all parts of the state, urban and rural, the law was declared void as an unreasonable exercise of the police power interfering with property rights. A mere interpolation limiting the state-wide effect of this law would have saved it. The *Trade-mark Cases,* 100 U. S. 82, 99, seem to be directly in point here. See, also, *Johnson v. Barham,* 99 Va. 305, 38 S. E. 136; *Slingluff v. Weaver,* 66 Ohio St. 621, 64 N. E. 574; *Dewey v. U. S.* 178 U. S. 510, 20 Sup. Ct. 981.

I think it much more reasonable to construe this statute as applying only to state officers, and this construction would require no interpolation of words. This construction would grant the writ to some of the relators. But having got into the statute the saving words by a process euphemistically called construction, the statute is still unconstitutional. Because in the first place the percentage required is based not on the party vote but on the vote for one candidate. It often occurs that the best service which a voter can render to his party and to the state is to vote against a nominee of his own party. When the party offers as a candidate for governor a man who is notoriously unfit or corrupt, or who has bought his nomination with money, it is the duty as well as the right of all members of that party to vote against this candidate. This is a

right which cannot be impaired by legislation. Any law which impairs this right is unreasonable and invalid. So is this law which forbids the voters of a county or district so to do on pain of loss of party place on the official ballot at the next ensuing election. There can be no twenty per cent. of zero. So if, instead of merely failing to vote for such unworthy candidate of their own party for governor, the voters in like case in a particular county or district cast a unanimous vote for his worthy opponent, their right to do this is likewise impaired because they can only do it at a loss of their party place on the official ballot at the next election. So in a case where for the foregoing reason and by reason of the great popularity of the worthy candidate of a minority party this candidate receives large accessions to his small party vote in a county or district, which accessions are from other parties or independent voters. In the latter case at the next succeeding primary this minority party cannot muster in the county or district twenty per cent. of the former abnormally large vote cast for its candidate for governor because such large vote was not composed of a strict party vote. Having been thus eliminated from the official ballot for one year there is no practical way provided for in our statutes to be replaced on the official ballot. Thus the law so construed interferes with the right to exercise the elective franchise and in effect penalizes its lawful and proper exercise and consequently is invalid. It is no answer to this to say that the office of governor is fairly representative of the party vote or that the instances are rare in which an undesirable candidate for that office will be nominated or an extremely popular candidate of the minority party for that office will be able to draw so largely from other parties. This begs the whole question. The act cannot be constitutional in some instances and unconstitutional in other related instances. Basing the percentage upon the party vote for one candidate does tend to constrain the voter to cast his ballot for that candidate regardless of his personal merits,

even though such candidate be unworthy or undesirable, and this interferes with his free choice and is therefore invalid. The law with this interpolation would also be subject to the former objections herein noted against the law as a whole. Indeed, with the interpolated words the effect of the law in impairing the suffrage rights of the nineteen per cent. who have attended the primary and voted because of the delinquency or default of those who did not attend or those who, having attended, voted some other party ticket, would be greatly accentuated because limiting it to districts would cause it to lack the corrective influence to which it might be subject from the contrary vote of other districts when the vote of the whole state is considered.

Again, with the words above quoted, whether their addition be matter of construction or interpolation, the act permits the elector to vote a party ticket for member of the state assembly in all cases where within this assembly district there was cast at the primary twenty per cent. of the vote for that party candidate for governor at the last preceding gubernatorial election. It however denies to this same voter the right at the same election to vote a party ticket for representatives in Congress where at the same primary there was cast in the Congressional district less than twenty per cent. of the same party vote in that Congressional district for governor at the last preceding gubernatorial election. The voter in that case can have no party representative in Congress. Although he has the right to favor and vote to advance the principles or measures of one party in state affairs and those of a different party in federal affairs, he is barred from any participation in the selection of a candidate for Congress because he conscientiously prefers the policy or attitude of the other party in state affairs and desires to act with it. Here he must yield up one right or the other, and he cannot lawfully be compelled to yield either at the legislative whim. But in case the voter desires to associate himself with a political party in both state

and national affairs he may find that he is entitled to vote a party ticket for member of assembly, but that there can be no party nominee for Congress, so that he must lose his vote for Congressman or else vote for an independent candidate, or for the candidate of some opposition party in whose principles he disbelieves. Representatives in Congress are to be elected by the people of the several states by electors possessing the qualifications which entitle them to vote for the most numerous branch of the state legislature. Const. U. S. art. I, sec. 2. Construing this, it is said in *Ex parte Yarbrough,* 110 U. S. 651, 4 Sup. Ct. 152: "It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state." See, also, *Swafford v. Templeton,* 185 U. S. 487, 22 Sup. Ct. 783; *Wiley v. Sinkler,* 179 U. S. 58, 21 Sup. Ct. 17. Within the meaning of the federal constitution as interpreted in these decisions, I think the voter qualified by state law to vote for member of assembly on a party ticket and thereby for party principles or measures cannot be denied by state statute, directly or indirectly, contingently or absolutely, the right to cast an equally effective ballot for his representative in Congress or the right to participate as a member of a political group or party in the selection of a candidate for Congress. Again, the law as thus interpolated or interpreted is destructive of the right to form and maintain political parties and thus indirectly or in effect vote for principles or measures. No political minority party could long exist where, by the effect of a statute, county after county and district after district would inevitably be left without party organization or party representatives. The party could not long survive the destruction of its local units. That this is the necessary effect of the statute in question cannot be doubted. Its enforcement must result in a progressive but certain destruction of a minority political party and leave the voter no choice but to vote for an irresponsible independent

candidate or to join the majority party and create a disturbance in its ranks. We have searched the statute laws in vain for any provision whereby a political party, having been once refused a party place for its gubernatorial candidate on the official general election ballot, can ever appear again as a party at an election. The statute expressly provides that all candidates shall be nominated either by a primary election or by nomination papers signed and filed. A nomination paper may be filed signed by a stated number of voters.

"In using words to express the party or principles represented by a candidate nominated by a nomination paper, if the same name is used as pertains to some political party making a nomination by convention, the words 'nomination paper' shall be used as a part of such designation." Sec. 30, Stats. (1898).

At the general election following the nominations no ballot except the official ballot can be voted. There the regular party tickets nominated at the primary election are to be printed each in a separate column. This last statute as it now stands includes the words "nominated by conventions," but these words are rendered nugatory by the later statute (ch. 666, Laws of 1907), which provides (sec. 11—2, Stats.) that all candidates must be nominated either at the primary or by nomination papers. The statute also provides: "The names of persons nominated by paper nominations shall be placed in the one or more columns [of the official ballot] designated independent." There is no way to ascertain how many voters of any party voted for either one of these independent candidates, consequently in such case the statute relative to percentages could not thereafter be complied with. Construing the statute in question to apply to candidates for county and district offices, the party voters would lose their right to vote a party ticket at one election, but about two years thereafter, at the primary election following the next gubernatorial vote, appear at the primary and endeavor to poll twenty per cent.

of the last party gubernatorial vote in that district or county. But when the gubernatorial party candidate, by operation of this statute, is once eliminated from the official ballot there is no way in which the party can ever get back on the official ballot. These are extraordinary difficulties put in the way of the exercise of the elective franchise, they rest upon no legitimate excuse or occasion for the exercise of the police power, they impair inherent rights recognized and upheld by our state constitution, and they are, I believe, unreasonable and unconstitutional.

The following opinion was filed December 14, 1910:

WINSLOW, C. J. (*dissenting*). I agree fully with Mr. Justice TIMLIN'S views as to the merits of these cases; I do not share his doubt as to the meaning of the law. I am quite well satisfied that it can and must be construed as applying as well to every subordinate election district in the state as to the state at large, and means that in each election district a candidate for an office limited to the district must receive at the primary election at least twenty per cent. of the vote cast by his party for governor in that district at the last preceding general election in order that his name may be placed in the party column on the official ticket.

In view of the importance of the case and the utterly indefensible character of this law, as it seems to me, I desire to add some comments of my own in as few words as I may, without elaboration or citation of authorities. We are guaranteed a republican form of government. That means a government where the sovereign power rests in the qualified electors and is actually exercised by officers chosen by them. When, therefore, the constitution defines the qualifications of electors, there is at once conferred upon those electors the right to vote, and that right no legislature can take away. There needs to be no express guaranty of the right in the constitution; it is

that right which makes the form of government republican. It cannot be taken away or materially impaired, because to take it away or materially impair it is to destroy the republican form of government. The right to vote means the right to vote effectively; not merely to cast a ballot under circumstances where it is certain that it can have no practical effect, but to be able to record the voter's will both as to men and as to measures in the most effective manner which is reasonably practicable, consistently with the preservation of order and the securing of an honest ballot.

There may be legislative regulation of this fundamental right for the purpose of preventing corruption or coercion of the electorate, for the purpose of making it impossible for illegal votes to be cast, and for the purpose of securing an orderly, speedy, and honest casting of the votes and ascertainment of the result.

All legislative restraints, conditions, or impediments to the voter's freedom of action which do not tend to accomplish one of these purposes, but which make it difficult for him to cast his vote with the fullest practicable effect, either for principles or men in either state or national elections, have no constitutional justification for their existence. The weapon that "executes a freeman's will" must be free if the man who wields it is to be truly a freeman. It is true that political parties as such have no constitutional rights guaranteed to them, and hence the specious argument is made that this law cannot be held unconstitutional because it affects or regulates only the party and not the voter himself. This argument I regard as absolutely fallacious.

We all know that a republican government is and must be a government by party. Whether it would be better if it were otherwise is beside the question. All human experience up to the present time has shown that it cannot be otherwise so long as human nature remains as it is. No significant change in governmental methods, no program of reform which is

worth the name, no considerable scheme for the betterment of the race or the improvement of its conditions, can be instituted and carried through except by means of an organization such as we call a party. This is a condition and not a theory, and it must be recognized when parties are to be legislated against.

If, by legislation nominally directed against parties only, the individual voter stands in danger of being deprived of his effective voice in either state or national affairs, such legislation cannot be justified any more than direct legislation against the voter himself which has like effect can be justified. That such is the character of this legislation seems to me certain. While in terms aimed at a party, in effect it is likely at any time to deprive the diligent member of a great minority party of his right to effectively vote for the principles he believes in, because other members of his party are not diligent. This court has decided that no registration law can absolutely deprive a constitutional voter of his right to vote because of his own neglect to register his name, but must give him an apportunity to cast his ballot on proving his qualifications. *Dells v. Kennedy,* 49 Wis. 555, 6 N. W. 246, 381. Here, however, we have a law which is likely at any time to deprive a legal voter of the possibility of casting an effective vote, not because of his own neglect, but on account of the neglect of others. I say "effective" vote, because it is common knowledge, so far as state or national elections are concerned, that the privilege of casting a vote in the independent column and not in any party column is of no value. Such votes are mere shots fired in the air. They are votes in form. They may satisfy the unthinking voter, but they accomplish nothing. They are practically votes thrown away.

The member of a minority party is the person who is chiefly in danger of thus losing his power of effective voting. This is very plain, as it seems to me. Whether any considerable number of voters get out to vote at the primaries must always depend upon the interest felt by the voters in the re-

sult. In a majority party there will always be interest, for there will always be candidates for the offices, both state and local, who will be pushing for the nomination and making active campaigns, because nomination will be considered almost, if not quite, equal to election. In a minority party, on the other hand, few persons will wish for the nomination and there will be competition only in rare instances. The consequence of this condition is not only certain as matter of theory, but equally certain as matter of history in this state. The fierce fight in the majority party will draw many of the lukewarm minority into the majority primaries; the minority primaries will be neglected; and thus it will be quite probable that the required twenty per cent. of votes will not be cast at the primary. When this happens on the primary vote for governor (as it has already happened once in this state prior to the existence of this law), the death knell of the party has been rung and the funeral ceremonies may well begin, for from that time on there can never be any standard from which to reckon the twenty per cent. in future elections. Nor can there be any resurrection, because the law apparently affords no opportunity for a new party to become recognized as such, or for an old party which has once failed in securing the twenty per cent. to draw the breath of life again. Thus it may easily happen that a large body of voters composing nineteen per cent. of a great national party in the state may perform every political duty required of them and diligently attend the primaries, yet, because their party companions are tempted to take part in the fierce contests going on in the ranks of the majority party, or are apathetic in early September and deem it more profitable to attend to their ordinary business rather than to go to the polls, may lose all power of effective voting, not only for one election but for all time to come, unless the law be changed. When it is considered that in this manner diligent voters may be easily rendered unable to effectively vote for Congressmen and for presidential elect-

ors and so be deprived of any voice in the great questions which are fought out in the political battle-field of the nation, the vicious character of this law becomes more apparent.

In my judgment the legislature cannot thus impair the diligent voter's right to cast an effective ballot. If it be desirable to enact legislation to keep the voters of one party out of the primaries of the other party, there are ways in which it may be done without penalizing the voter who has performed his whole duty. The punishment should be fitted to the crime and should be inflicted on the guilty party and not upon his innocent neighbor.

The act is wrongly entitled. It should be called "An act to ensure the gradual extinction of all minority parties."

The following opinion was filed December 19, 1910:

BARNES, J. The law under discussion may have been intended to accomplish any one of several purposes. I do not assume to know what its real object was. It may have been and probably was intended to prevent members of one party from voting for the candidates belonging to some other political faith in the primaries. If this be the object of the act, it is easy to imagine how its purpose could be more fairly and more effectively carried out by the enactment of a law of an entirely different character. But the legislature is not bound to adopt any particular means of bringing about such a result, and I am not prepared to say that the legislature was not acting within the field of its discretion in attempting to remedy the incongruity aimed at in the particular way in which it did. Assuming that the right existed to reasonably regulate primary elections in the manner attempted, the percentage adopted is not so high as to clearly indicate bad motives or sinister purposes. I reached the conclusion arrived at by the majority of the court, although by a somewhat different process of reasoning. I do not desire to do more than state my

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provides that before a political party can have recognition as such on the official ballot it must have cast a certain vote at the primaries. To say that, because the constitution requires a resident of the state to have certain *qualifications* before he can vote at all, it also guarantees that any political party with which he chooses to affiliate shall occupy a regular place on the official ballot, is in my judgment altogether too far fetched. I fail to see where one result follows as the logical consequence of the other. I am unable to bridge what I deem to be the chasm between the qualification of the voter and the right of a political party to a place on the ballot, and to hold that there is any constitutional disqualification of the voter because his party may not cast the required number of votes at the primary to secure a place on the ballot. It seems to me that the object of the 1909 amendment to the primary election law is too remote from the provision of the constitution referred to to be considered as an invasion of it. A law cannot be declared unconstitutional unless it clearly appears that it is so, and I am unable to see any such clear violation of the constitution as would warrant me in condemning the law.

This court adopted the rule at an early date that a law may be declared void though it violate no specific provision of the constitution. *Durkee v. Janesville*, 28 Wis. 464. This rule has been subsequently followed. At best it is a rule that should be sparingly applied. That deference which one coordinate department of the government owes to another forbids the exercise of such power except in extreme cases. It is only where a law operates unequally and perpetuates plain and palpable injustice, incompatible with the natural and inherent rights of the individual, that it should be held void where it does not run counter to any constitutional guaranty. I do not think that ch. 477, Laws of 1909, falls within this category of legislative acts or that it runs counter to the preamble or declaration of rights in the constitution, assuming that those provisions can be construed as having any applica-

tion whatever to the right of suffrage. I supposed it was the settled law of this state that "mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care," and that, so long as "the right of the individual to vote for the candidate of his choice is not interfered with," the constitutional right guaranteed is not infringed. *State ex rel. Runge v. Anderson,* 100 Wis. 523, 536, 76 N. W. 482.

STATE EX REL. HANNA VS. FREAR and others.

October 8—October 15, 1910.

ACTION invoking the original jurisdiction of this court to compel the state board of canvassers to certify to the various county clerks of the state the name of *T. H. Hanna* as that of the Democratic candidate for state senator for the Twenty-first senatorial district of this state, to be placed on the official ballot to be used at the general election to be held in November, 1910.

The complaint by appropriate allegations and a demurrer thereto presents for adjudication the questions raised by the pleadings in the case of *State ex rel. McGrael v. Phelps,* decided herewith (*ante,* p. 1).

The cause was argued and submitted at the same time and by the same counsel as in the case of *State ex rel. McGrael v. Phelps.*

The following opinion was filed October 15, 1910:

PER CURIAM. This cause is ruled by the decision in the case above referred to. Following that decision the demurrer for insufficiency must be sustained and the action dismissed. The court so orders.

TIMLIN, J., and WINSLOW, C. J., dissent. BARNES, J., concurs in the conclusion reached.

On October 25, 1910, the relator moved for a rehearing, and also moved that Supreme Court Rules 37–41, relating to motions for a rehearing, be suspended. The latter motion was denied; and the motion for a rehearing was afterwards abandoned.

BURGESS and others, Appellants, vs. COMMERCIAL NATIONAL BANK OF APPLETON and another, Respondents.

October 29—November 15, 1910.

Payment: Under duress or voluntary? Exaction of excessive amount on note: Fraud: Pleading.

1. **Where the holder of a promissory note demanded payment of a sum in excess of the amount legally due thereon as a condition of surrendering bonds pledged for its payment, and the makers, with knowledge of the facts, paid such excessive sum in order to obtain immediate possession of the bonds so that the necessary delivery could be made to a purchaser to whom they had made arrangements to sell the bonds, such payment was not made under duress, but was voluntary, and the excess so paid cannot be recovered.**
2. **An allegation in such case that defendants (the payee of the note and a bank with which it had been left) "conspired together to fraudulently exact from plaintiffs an excessive amount of interest" was insufficient, when construed with the other allegations of the complaint, to show actionable fraud.**

APPEAL from an order of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This is an appeal from an order of the court below sustaining a demurrer to the complaint. The complaint alleges the copartnership of the plaintiffs and the corporate existence of the defendants, and further alleges:

"4. That heretofore and on, to wit, May 17, 1909, these plaintiffs, being indebted to the defendant power company in the sum of $98,450, executed and delivered to the said defendant power company their promissory note in writing, dated said day, wherein and whereby these plaintiffs promised and agreed to pay to the order of said defendant power company at its office $98,450 five months after the date of said note, with interest at the rate of six per cent. per annum, payable at maturity; that as collateral security for the payment of said note the plaintiffs then and there delivered to said defendant power company $124,000 par value of the first mortgage 5 per cent. gold bonds of the Ashland Light, Power

& Street Railway Company, due January 1, 1939, which said bonds were the property of these plaintiffs; that hereto annexed, marked Exhibit 1 and made part hereof, is a copy of the said note and the conditions thereof as to the said bonds being deposited as collateral security for its payment.

"5. That it was agreed by and between the plaintiffs and the defendant power company at the time of the execution and delivery of said note that the plaintiffs should have the right to pay the whole or any part thereof at any time before maturity, and that when and as any partial payment was made upon said note there should be surrendered and delivered to plaintiffs a proportionate amount of said bonds, which, for convenience, was agreed to be as 86 is to 100, that is—as often as each $86 should be paid upon said note, $100 par value of said bonds should be delivered to plaintiffs, until, when final payment of the note and interest should be made, all of said bonds remaining on hand should be surrendered and delivered to plaintiffs.

"That by some arrangement, the nature of which is wholly unknown to plaintiffs, said defendant power company soon after the date of said note delivered and turned over to said defendant bank the said note and bonds, and plaintiffs were instructed and directed to make all payments upon said note direct to the defendant bank, and plaintiffs were informed by said defendant power company that upon any payment being made the proportionate amount of bonds above stated would be forthwith delivered to plaintiffs by the defendant bank.

"6. That thereafter, and on, to wit, July 13, 1909, plaintiffs paid upon said note the sum of $43,000, which amount, by direction of the defendant power company, was paid to and accepted by the defendant *Commercial National Bank,* and said defendant bank, upon receipt of such payment, indorsed the same upon said note and surrendered and delivered to plaintiffs $50,000 par value of the said bonds of the said Ashland Light, Power & Street Railway Company.

"7. That thereafter plaintiffs made payments upon said note and defendant bank accepted from plaintiffs and indorsed thereon the amounts at the dates stated, as indicated in Exhibit 2 hereto annexed and made part hereof.

"8. That as each payment was made a proportionate part of bonds were delivered, until on September 30, 1909, the

date when the last payment of $7,740 was made, as shown by Exhibit 2 hereto annexed, there remained due upon said note $110 of principal and no more, and that there remained on hand $10,000 par value of said bonds, deposited as collateral security; that on or about October 6, 1909, plaintiffs were desirous of paying the final amount due upon said note, together with the interest thereon, and of having the note canceled, surrendered, and delivered up to them, and the $10,000 bonds held as collateral by said defendant bank surrendered and delivered to plaintiffs; that plaintiffs had then made arrangements for the sale of said bonds, and it was necessary in handling them that they be obtained immediately by plaintiffs, so that a delivery could be made thereof to the purchaser; that on October 11, 1909, there was due upon said note the sum of $110 principal, and the sum of $1,391.45 interest, and no more; that plaintiffs, on or about the 9th day of October, 1909, inquired of said bank what would be the amount necessary to pay said note and interest in full so that said bank would surrender and deliver to plaintiffs the said bonds, and plaintiffs were then notified by defendant bank that before said bonds would be delivered full interest must be paid upon said note, making no account of the partial payments which had been made from time to time, as shown by said Exhibit 2, and that said interest amounted to the sum of $2,355.60, which amount of interest said defendant bank required plaintiffs to pay before the $10,000 par value bonds held by it as aforesaid would be surrendered and turned over to plaintiffs; that in order to secure possession of said bonds from defendant bank promptly so that plaintiffs could use the same and deliver them according to the sale made by plaintiffs as above stated, plaintiffs were compelled to pay to said defendant bank the sum of $964.15, interest, in excess of the amount legally due upon said note and in excess of the amount due according to the agreement and understanding between plaintiffs and defendant power company at the time said note was executed and delivered to the defendant power company.

"That by reason of said transaction the defendant bank, on or about the 11th day of October, 1909, wrongfully, fraudulently, and unlawfully obtained and exacted from these plaintiffs the said sum of $964.15, which amount these

plaintiffs paid to said bank on said date, together with the sum of $1,391.45, the actual amount of interest due, and the sum of $110, the sum due for principal upon said note, making in all the sum of $2,465.60.

"That as plaintiffs are informed and believe, said defendant bank was acting as agent for the defendant power company in making the collections of moneys upon said note paid by plaintiffs, and in surrendering and delivering to plaintiffs the bonds from time to time as payments were made, and that, in compelling plaintiffs to pay the said sum of $964.15, excess interest, as above set forth, said defendant bank and said defendant power company were acting in collusion and together had planned, as plaintiffs are informed and believe, to thus wrongfully, fraudulently, and illegally exact from plaintiffs the said sum of $964.15, excess interest, and that of the moneys thus wrongfully, fraudulently, and illegally exacted from plaintiffs and which plaintiffs were compelled to pay said defendants each received a part, the exact amount and proportion received by each being unknown to plaintiffs.

"That prior to the commencement of this action plaintiffs demanded of the defendants the said sum of $964.15.

"Wherefore plaintiffs demand judgment against the defendants for the sum of $964.15, with interest thereon from the 11th day of October, 1909.

"LAMOREUX, SHEA & CATE,
"Attorneys for Plaintiffs."

Exhibit I.

"$98,150. Boston, Mass., May 17, 1909.

"Five months after date we promise to pay to the order of *White River Power Company,* Rhinelander, Wisconsin, at its office, ninety-eight thousand one hundred and fifty dollars, for value received, with interest at the rate of six per cent. per annum, payable at maturity, after having deposited with said company as collateral security, for payment of this or any other direct or indirect liability or liabilities of Burgess, Lang & Company to said company, due or to become due, or that may be hereafter contracted or existing howsoever acquired by said company, the following property, viz.: ($124,000) one hundred and twenty-four thousand dollars par value of the first mortgage 5 per cent. gold bonds of the

Ashland Light, Power & Street Railway Company due January 1, 1939; with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any brokers' board, or at public or private sale, at the option of said company, or its assigns, and with the right to be purchasers themselves at such brokers' board, or public sale, on the nonperformance of this promise; or the nonpayment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either, or all of said liabilities, as said company or its president or secretary shall deem proper, returning the overplus to the undersigned. In case of the insolvency of the undersigned, any indebtedness due from the legal holder hereof to the undersigned may be appropriated and applied hereon at any time, as well before as after the maturity hereof.

"BURGESS, LANG & COMPANY."

Exhibit II.

July	13 paid	$43,000
July	22 paid	8,600
Aug.	2 paid	8,600
Aug.	6 paid	4,300
Aug.	24 paid	4,300
Sept.	14 paid	4,300
Sept.	19 paid	4,300
Sept.	24 paid	8,600
Sept.	30 paid	4,300
Oct.	8 paid	7,740

The defendants demurred to this complaint on the ground of want of facts sufficient to constitute a cause of action.

For the appellants the cause was submitted on the brief of *Shea & Cate* and *C. A. Lamoreux.* They contended that even if the complaint did not, as it does, show a sale of the bonds and a peculiar and pressing necessity for immediate possession by plaintiffs, the payment was in a legal sense under duress. *First Nat. Bank v. Sargent,* 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; *Mays v. Cincinnati,* 1 Ohio St.

268; *Adams v. Schiffer,* 11 Colo. 15, 17 Pac. 21, 29; *Astley v. Reynolds,* 2 Strange, 915; *Brumagim v. Tillinghast,* 18 Cal. 265; *Radich v. Hutchins,* 95 U. S. 210; *Chandler v. Sanger,* 114 Mass. 364; *Cobb v. Charter,* 32 Conn. 358; 30 Cyc. 1308; *Scholey v. Mumford,* 60 N. Y. 498; *Chase v. Dwinal,* 7 Me. 134.

C. G. Cannon, for the respondents.

KERWIN, J. The complaint in this case alleges that the amount of the note was $98,450 and the exhibit attached thereto, purporting to be a copy of the note, states the amount to be $98,150. We have examined the record and find that the exhibit attached to the complaint corresponds with the printed case, and we conclude that the statement in the complaint is correct and that the statement of the amount in the exhibit is merely a clerical error. We arrive at this conclusion from the fact that the circuit judge below in his written opinion, which is a part of the record, states the amount of the note to be $98,450. However the variance is not material and would not affect the result.

The theory of the appellants' case is that the amount of money paid and sought to be recovered back was involuntarily paid by force of wrong and fraud of the defendants. As will be seen, there are no allegations in the complaint of facts showing fraud, the only allegation being that "defendants conspired together to fraudulently exact from the plaintiffs an excessive amount of interest." This allegation, when construed in connection with other allegations of the complaint, is clearly insufficient to constitute actionable fraud. *Herbst v. Land & L. Co.* 134 Wis. 502, 115 N. W. 119; *New Bank v. Kleiner,* 112 Wis. 287, 87 N. W. 1090. But counsel for appellants argue that the money was paid involuntarily and under duress, hence can be recovered back.

Counsel for respondents, to sustain the order below, insists upon several points which may be summed up as follows:

(1) That the payment was voluntary and made without duress and with full knowledge of all the facts, hence cannot be recovered back; (2) that the facts set up in the complaint amount to an accord and satisfaction; (3) that the facts pleaded amount to an account stated; (4) that there were no sufficient allegations of fraud; and (5) that the plaintiffs are estopped from maintaining the action under the facts alleged.

We do not deem it necessary to review the various positions taken by counsel for respondents beyond the first stated, namely, that the payment was voluntary with full knowledge of the facts, therefore cannot be recovered back. On this ground the court below held that the complaint failed to state a cause of action, and we are of opinion that it was clearly right in so holding. We have set out in the statement of facts the complaint at length, from which it appears that all of the money paid was voluntarily paid, with full knowledge of the facts, hence it cannot be recovered back upon well settled principles of law. *Clancy v. McEnery,* 17 Wis. 177; *Custin v. Viroqua,* 67 Wis. 314, 30 N. W. 515; *Powell v. St. Croix Co.* 46 Wis. 210, 50 N. W. 1013; *Shirley v. Waukesha,* 124 Wis. 239, 102 N. W. 576; *Raipe v. Gorrell,* 105 Wis. 636, 81 N. W. 1009; *Gage v. Allen,* 89 Wis. 98, 61 N. W. 361. The complaint falls far short of making a case of payment under duress of person or property. *Williams v. Phelps,* 16 Wis. 80; *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495; *York v. Hinkle,* 80 Wis. 624, 629, 50 N. W. 895; *Porter v. Cook,* 114 Wis. 60, 89 N. W. 823.

By the Court.—The order appealed from is affirmed.

JONES and another, Appellants, vs. METROPOLITAN CASUALTY INSURANCE COMPANY, Respondent.

October 29—November 15, 1910.

Insurance: Plate glass: Exception of loss "resulting directly or indirectly from fire."

1. A contractual negation of liability for damage caused directly or indirectly by a specified element presents a different question from that presented in an investigation concerning the legal or proximate cause of an injury.
2. A provision in an insurance policy that the insurer shall not be liable for any loss or damage resulting directly or indirectly from fire includes all damage of which fire is a proximate cause or a principal cause or a link in the chain of causation or an indirect cause or any cause which the law would recognize as such.
3. Where plate glass was insured under a policy containing the above provision and an incendiary fire in a distant building containing dynamite caused the dynamite to explode and the concussion of this explosion broke the glass, the breakage resulted directly or indirectly from the fire and the insurer is not liable.

APPEAL from a judgment of the circuit court for Vilas county: A. H. REID, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *Smart, Van Doren & Curtis.* They cited, among other authorities, *Thurston v. Burnett & B. D. F. Mut. F. Ins. Co.* 98 Wis. 476, 74 N. W. 131; *Bakalars v. Continental C. Co.* 141 Wis. 43, 122 N. W. 721; *Wausau T. Co. v. United Firemen's Ins. Co.* 123 Wis. 535, 101 N. W. 1100.

For the respondent the cause was submitted on the brief of *Albert S. Larson.* He cited, besides other cases, *Cary v. Preferred Acc. Ins. Co.* 127 Wis. 67, 106 N. W. 1055; *Winchel v. Goodyear,* 126 Wis. 271, 105 N. W. 824; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *O'Connor v. Queen Ins. Co.* 140 Wis. 388, 122 N. W. 1038, 1122; *Karow v. Continental Ins. Co.* 57 Wis. 56, 62, 15 N. W. 27; *Merrill v. Travelers'*

Ins. Co. 91 Wis. 329, 64 N. W. 1039; *McQuillan v. Mutual R. F. L. Asso.* 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925; *Milwaukee C. Asso. v. King, F. & M. Co.* 112 Wis. 647, 88 N. W. 598; *Murphey v. Weil,* 92 Wis. 467, 66 N. W. 532; *Fulton v. Stevens,* 99 Wis. 307, 74 N. W. 803; *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777; *Johnson v. Pugh,* 110 Wis. 167, 85 N. W. 641; *Hart v. Hart,* 117 Wis. 639, 94 N. W. 890; *Monte v. Wausau P. M. Co.* 132 Wis. 205, 210, 111 N. W. 1114.

TIMLIN, J. By a "plate glass policy" the appellants were insured against loss by breakage of glass (in described premises) the result of accident and due to causes beyond the control of insured. The policy further provided: "This company is not liable for any loss or damage resulting directly or indirectly from fire, whether on the premises above described or not." A warehouse about 700 feet distant containing some dynamite was set on fire by a person unknown; the fire caused the dynamite to explode; the concussion of this explosion broke the glass. To a complaint setting forth these facts a demurrer was sustained and judgment given for defendant.

All causes have behind them in the chain of causation other causes. Every event is the outcome or result of causes operating directly or indirectly in sequence or simultaneously to produce that event. In order to justly fix liability the law endeavors to select in a practical way the legally responsible cause, which, without much regard to the literal meaning of the adjective word, we call the proximate cause. In some cases the proximate cause is very obvious; in others it requires great discrimination to discover and identify it. A negation of liability for damages caused directly or indirectly by a stated element presents for investigation quite a different question. If parties to a contract so provide, they have employed one of the most comprehensive expressions which

the language affords to exclude the right to recover all damages caused by that element, whether proximately or not. There is in this case no question of a simultaneously concurring independent cause, and what is decided does not include that. In this case, in order to be within the obligation and without the exception of the policy, it must appear that the fire was not the proximate cause nor a principal cause nor a link in the chain of causation nor even an indirect cause, in short not a cause at all, of the breakage. Here the pleader shows that the breakage was caused directly or indirectly, it matters not which, by the fire.

By the Court.—Judgment affirmed.

WOODLOCK, Respondent, vs. TOWN OF MINOCQUA, Appellant.

October 29—November 15, 1910.

Village plat: Width of streets: Shore line of lake as boundary: Dedication: Intent: Subsequent quitclaim deed.

The recorded plat of a village shows that by the survey it embraced all the land lying between certain definite lines and the shore of a lake and that the shore line formed a part of the boundary of the land platted. The location of "Park Avenue" is indicated on one side by the lines of the blocks abutting thereon and on the other side by the irregular shore line of the lake, except that a small portion of the avenue lies between two blocks and is there marked as sixty feet wide. The width of the other portions of the avenue is not indicated by figures on the plat, but the width of the other streets is so marked. The name of the avenue is printed nearly midway between the shore line and the block lines, and not, as in the case of other streets, in the center of a street sixty feet wide. The situation and location of the lots and blocks fronting on the avenue evinces a plan to provide for a wide avenue along the lake shore for the use of the public, to afford access to the water, and for the parking of the lake shore; and the unrestricted and open use of the whole place by the public and the conduct of the dedicator after the platting harmonize with that idea. The only evidence to the contrary is a quitclaim deed given by the

dedicator about sixteen years after the land was platted, purporting to include unplatted lands lying between the avenue and the lake, but such deed recited that "the grantor makes no representations whatever as to the title to the lands herein described." *Held*, that except as to the small portion above mentioned Park Avenue extends to the water's edge and embraces all land between the shore line and the opposite blocks.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

In 1888 Henry C. Payne, as trustee, made and had recorded a plat of the unincorporated village of Minocqua, situated in the defendant town. A copy of the plat, omitting most of the subdivisions of the blocks and other nonessential details, appears on page 71.

The surveyor's certificate states that he had surveyed, staked out, and mapped by order and direction of Henry C. Payne:

"All those parts of government lots Four (4), Five (5) and Six (6) of Section Fourteen (14), Township Thirty-nine (39) north, Range Six (6) east of the fourth principal meridian enclosed within the following described boundary lines, viz.: Beginning at a point marked by an iron monument on the north line of said government lot five (5) distant 223 6/10 feet east of the northwest corner of said lot 5; Thence running east along said north line a distance of 722 8/10 feet; Thence deflecting 81° 05′ right and running south 8° 55′ east a distance of 676 5/10 feet to the shore of Lake Kawaquesage; Thence following the shore line a generally southwesterly direction to a point which is 100 feet south of the center line of the Chicago, Milwaukee and St. Paul Railway, as now established and constructed, measured at right angles thereto from station 2850–09; Thence running a distance of 1002 feet to the point of beginning."

On February 23, 1904, Henry C. Payne made a quitclaim deed to the plaintiff of the following lands:

"All of that part of Government Lot No. 4, Township No. 39, Range 6 East (unplatted) laying west of Park Avenue and North of Milwaukee Street, and South of Front

Street in the Village of Minocqua, Vilas County, Wisconsin. All of that portion of Government Lot Number 5, Township No. 39, Range 6 East (unplatted) lying South and West of Park Avenue and West and North of Lot No. 6, Block No. 13, Village of Minocqua, Vilas County, Wisconsin. All of that portion of Government Lot No. (5) five, Township 39, Range 6 East (unplatted) laying South and East of Park Avenue and East and North of Lot One (1), Block 13, Village of Minocqua, Vilas County, Wisconsin."

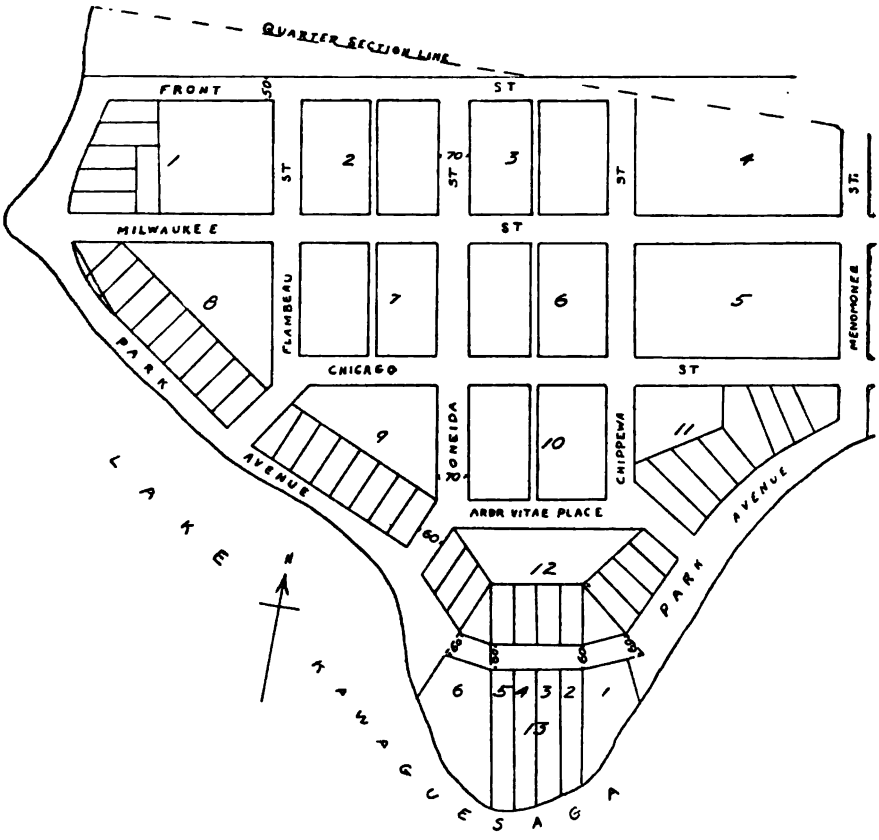
The deed also contains the following: "It is understood that the grantor makes no representations whatever as to the title to the lands herein described."

The plaintiff brings this action in ejectment to obtain possession of the parcels of land described in his deed, on the theory that these lands were reserved by Henry C. Payne when the plat was recorded and were not dedicated to the public by the plat, and that Park avenue is nowhere to exceed sixty feet wide, or the ordinary width of streets in such plat.

On the plat of the village Front street is marked as being fifty feet wide. Oneida street in one part is shown as seventy feet wide and in another part as sixty feet wide. The middle portion of that part of Park avenue which lies between blocks 12 and 13 is marked as sixty feet wide. At the ends of this portion of Park avenue the street is apparently less than sixty feet wide. The width of the rest of Park avenue is not indicated by any figures. The one side thereof is defined by the block lines of the blocks fronting thereon, and the opposite side of the street has no line or limit indicated inside of the shore line of the lake. The name "Park avenue" is printed nearly midway between the shore line and the block lines and not in the center of a street sixty feet wide from the block line fronting thereon, as is the case with the other streets of the plat. The rest of the streets of the village are shown as being sixty feet wide.

There was evidence before the court to show that the lands in controversy were not assessed or taxed after the plat was recorded; that Henry C. Payne refused to consider a sale of

the lands in controversy and stated that they were parts of Park Avenue; that the land near the lake shore opposite block 1 had been used by the town as a site for a water-pumping plant and that the town had piled wood upon it; that the



town had placed logs along this part of the shore and had done some riprapping there to protect the shore from the action of the waters; that after the wood was removed the town officers had the ground cleaned up, raked off, and leveled; that the town officers had placed logs and done some riprapping along the shore of the lake opposite blocks 8 and 9; that the town officers had permitted the construction and maintenance of a boathouse and landing on the land north and west of block 13;

that boathouses were built by private parties on the shore opposite blocks 8, 9, and 11; and that the public had been accustomed to cross over and use the land between blocks 1, 8, 9, 11, and 12 and the lake shore for landing purposes.

By agreement of the parties a jury was waived and the action was tried by the court. The court found that there was no dedication of the lands in controversy for public purposes under the plat; that no intention to dedicate these lands had been affirmatively shown; that the plat did not operate as a grant or dedication to public use of the parcels of land described in the deed from Payne to the plaintiff; that Park avenue was intended to be of a width not exceeding sixty feet, to be measured from the block line of the blocks abutting thereon; that the defendant had no interest in or right to the possession of the premises covered by the deed; and that the plaintiff was entitled to the possession thereof and damages for the unlawful withholding thereof, and to his costs and disbursements. This is an appeal from the judgment on the findings of the court.

For the appellant there were briefs by *John Van Hecke*, attorney, and *Wm. E. Fisher*, of counsel, and oral argument by *Mr. Van Hecke*.

For the respondent there was a brief by *F. J. & A. H. Smith*, and oral argument by *F. J. Smith*.

SIEBECKER, J. The question presented by the record is whether Henry C. Payne, as trustee, granted and dedicated the lands in dispute to the public by the recorded plat of the village of Minocqua. This question is whether it was intended to include them in the plat as part of Park avenue. The map of the plat gives the courses and measurements of the boundary lines of the land embraced in the plat and the subdivisions thereof into lots, blocks, and streets, as surveyed and marked on the land and as they are represented on the recorded plat. Such platting, therefore, implies that the land

had been surveyed and that such survey located and identified by boundary lines the land embraced therein, that it located and identified the lots, blocks, and streets thereon, and that such surveyed location and identification of the land and the divisions into blocks and streets are evidenced by the lines and figures represented on the recorded plat. From this recorded plat it appears that the plat of ground surveyed embraced all the land lying between certain definitely established survey lines and the shore line of Lake Kawaguesage, and that the shore line formed part of the boundary of the land platted. On the recorded plat the original location of Park avenue is indicated on the one side by the block line of the blocks abutting thereon; the opposite side thereof by a line representing the shore line of the lake. This line also represents the boundary of the land, platted as terminating on the shore of the lake. These representations on the recorded plat, in connection with the lines indicating the location of blocks, lots, and public streets, tend to show that Park avenue was platted and located as including the land lying between the lake and the opposite block line abutting thereon on each side of block 13. This shows that it extended to the water's edge and embraced all the land between the shore and the opposite blocks. Furthermore, the name "Park avenue" and its location on the recorded plat imply that it is a public thoroughfare of larger dimensions than the ordinary platted street. Again, the lines and location of that portion of this avenue between blocks 12 and 13 and the figures thereon indicate that this portion of the avenue only was to be limited to the width of sixty feet and that the avenue expanded at each end of this portion and extended to the shore line. In addition to the foregoing evidential inferences from the recorded plat, the situation and location of the lots and blocks fronting on Park avenue, as represented, evince a plan in platting this ground providing for a wide avenue along the lake shore for the use of the public, to afford access to the water, and for the parking

of the lake shore. The irregularities of the shore and the omission of the figures indicating the width thereof in feet, as is done with the other streets, sustain this view. The unrestricted and open use of all of this land by the public and the conduct of the dedicator after it was platted harmonize with the idea that this disputed land was embraced in the recorded plat as "Park avenue." The only evidence in conflict therewith is the subsequent quitclaim deed, executed by the person who platted the land, of certain alleged unplatted portions of the ground located within the limits of Park avenue as above described. This deed contains the following declaration: "It is understood that the grantor makes no representations whatever as to the title to the lands herein described." This is of significance as tending to show that the grantor entertained a doubt as to whether he had any title to the land embraced in the deed. The evidentiary force of the recorded plat is so clear as to be well nigh conclusive to the effect that the land which it was sought to convey by this deed is included in the village plat of Minocqua and was platted as Park avenue, and hence was dedicated to a public use.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for the defendant.

BARNES, J., took no part.

WILCOX and others, Appellants, vs. SCALLON, Respondent.

September 15—December 6, 1910.

Vendor and purchaser of land: Oral contract: Deed in escrow: Oral surrender of vendee's interest.

1. Where, pursuant to an oral contract for the sale of land, the vendor executed a deed and deposited it in escrow to be delivered to the grantee on payment of the balance of the purchase money by a specified date, and the grantee went into possession, no title

passed, and the deed had no validity until the condition was fulfilled.

2. In such case the interest which the vendee acquired was at best only the right to a conveyance on payment of the balance of the agreed price, and such interest could be and was surrendered by a subsequent oral agreement between the parties, entered into after default, whereby the sale was rescinded and the purchaser and his family were to remain upon the land and have the use of the same upon condition that they should pay the taxes and make improvements thereon.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought to enforce specific performance of a contract made in January, 1896. The alleged contract is based upon the execution of a deed placed in escrow, to be delivered upon payment of the balance of purchase money. It is alleged in the complaint that the plaintiffs tendered the balance due on the purchase price and that the defendants refused to deliver the deed. The prayer is that the defendants be required to deliver the deed and convey the lands to the plaintiffs and for general relief. The action was originally commenced against the defendant, *William Scallon,* and one Carpenter, who held the deed in escrow, but upon sustaining the demurrer of Carpenter the action was dismissed as to him. The answer of defendant, *Scallon,* denies generally the material allegations of the complaint, and further sets up that the plaintiffs occupied the land described in the complaint as tenants of the defendant.

The court found: (1) That on January 16, 1896, the defendant duly made and executed a quitclaim deed of the south half of the northeast quarter of the southeast quarter and the northwest quarter of the northeast quarter of the southeast quarter of section 23, town 10, range 3, in said Sauk county, to Thomas J. Wilcox for the agreed consideration of $90; that defendant agreed to accept and did accept as part payment of said purchase price certain cattle delivered to him by

said Wilcox at the agreed price of $64; that by an agreement of the parties then made the balance of the purchase price in the sum of $26 was to be paid within three weeks from that date or the deal was to be off. (2) That said quitclaim deed was delivered in escrow to be held until said $26 was paid in accordance with the agreement of the parties and was then to be delivered to said Wilcox; that said balance of $26 was not paid within the period of three weeks and that the same has never been paid. (3) That after the expiration of said three weeks said Wilcox, in failing to pay the balance on said land, gave up his right to demand a deed therefor; that defendant then agreed with said Wilcox that said Wilcox and his family might remain upon said land and have the use of the same upon condition that they should pay the taxes upon the land and make improvements thereon. (4) That said Wilcox died intestate in the fall of 1903; that the above plaintiffs are his only heirs at law. (5) That the said Wilcox and the plaintiffs as his heirs after his decease remained on said land under such agreement, paid the taxes thereon, and made improvements thereon in return for the use of said land. (6) That the logs taken from said land by the defendant during the time that the plaintiffs have occupied it belonged to and were the property of the defendant. (7) That the services of the plaintiff *William E. Wilcox* in attempting to clear land for the defendant were of no value; that such land was in fact never cleared by him.

And as conclusions of law the court found: (1) That the plaintiffs are not entitled to a delivery of the deed deposited in escrow nor to a conveyance of said land from the defendant. (2) That plaintiffs are not entitled to recover any sum for logs taken from the premises in question by the defendant, nor for the clearing alleged to have been done on defendant's land. (3) That the defendant recover his costs and disbursements to be taxed according to law.

Judgment was entered accordingly, from which this appeal was taken.

Albert Wood, attorney, and *F. W. Hall,* counsel, for the appellants.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

The following opinion was filed October 4, 1910:

KERWIN, J. The findings of the court below are attacked by the appellants, and they say in their brief that the only question in the case is, Did Thomas J. Wilcox, in failing to pay the balance on the land, give up his right to the deed, and was a new arrangement made? The findings are set out in the statement of facts and there is ample evidence to support them. The material question for consideration, therefore, is whether upon the findings thus made the appellants were entitled to judgment. It is argued by appellants that the respondent, *Scallon,* could not have reclaimed the land in any event without tendering back the property received, because the relation of vendor and vendee existed under the contract, and the appellants, having gone into possession under the agreement, acquired an interest in the land. But the deed was deposited in escrow, and no title passed or was to pass until payment of the balance due within the period prescribed by the agreement. This payment was not made, and upon default it was competent for the parties to make the agreement which they did, by the terms of which the deal was declared off and Wilcox was to remain in possession as tenant of respondent.

It is doubtless true that, had no new agreement been made between the parties after default, Wilcox would have had such an interest as would have entitled him to redeem on tender of the balance of the purchase money. But the new agreement deprived him of that right if such agreement was valid. But it is insisted by appellants that the interest of Wilcox was such as could only be surrendered by an instrument in writing, or by act or operation of law under sec. 2302, Stats. (1898), which provides that "No estate or interest in

lands . . . shall be . . . surrendered . . . unless by act or operation of law or by deed or conveyance in writing, subscribed by the party . . . surrendering . . . the same." But the interest which the appellants acquired by virtue of part payment and getting into possession was at best only the right to a conveyance on payment of balance of the agreed purchase price. No title passed to them, therefore such interest could be surrendered by oral agreement of the parties, and especially when the agreement was executed. *Telford v. Frost,* 76 Wis. 172, 44 N. W. 835; *Maxon v. Gates,* 112 Wis. 196, 201, 88 N. W. 54; *Hutchins v. Da Costa,* 88 Wis. 371, 60 N. W. 427; *Goldsmith v. Darling,* 92 Wis. 363, 66 N. W. 397; *Lovejoy v. McCarty,* 94 Wis. 341, 68 N. W. 1003; *Strain v. Gardner,* 61 Wis. 174, 21 N. W. 35. In *Telford v. Frost* and *Maxon v. Gates, supra,* it was held that the relation of vendor and vendee under a land contract can be changed without an instrument in writing. The case at bar is a stronger case in favor of the respondent, because the deed had no validity until delivered.

But it is insisted that the findings are not supported by the evidence. It is true that because of the death of Wilcox much evidence respecting the transaction between the parties which would have been admissible had he lived was rendered inadmissible. However, there is sufficient evidence in the record by way of admission of the deceased to several parties, as well as other facts and circumstances proved, which amply support the findings of the court below. We think the findings are well supported by the evidence and support the judgment.

By the Court.—The judgment of the court below is affirmed.

A motion for a rehearing was denied December 6, 1910.

STATE EX REL. BANCROFT VS. FREAR, Secretary of State.

October 10—December 6, 1910.

Primary elections: Death of candidate after ballots printed: Votes knowingly cast for decedent not to be counted: Knowledge when inferred: General election law, how far applicable to primaries: Filling vacancies.

1. A dead man is not a "person" within the meaning of sec. 11—18, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 18).
2. Votes which are in form cast for a deceased person by voters who know the fact of his decease cannot be considered as votes for or against any person, but must be regarded as so much blank paper.
3. During a campaign in which factional lines were closely drawn, five days before the primary election, and after the ballots therefor were printed, a candidate for the nomination for the office of attorney general came to his death by drowning. The fact of his death was published generally in the newspapers throughout the state, which further stated that if he received a plurality of votes at the primary the state central committee could fill the vacancy. Such statement was repeated in certain letters sent to many parts of the state and in numerous telegrams sent to supporters of one faction, calling upon them to urge voters to vote for the decedent notwithstanding his death. *Held*, that from these facts (admitted on demurrer) the court would infer that of the 63,482 votes cast for the decedent more than enough to give him the plurality of 5,286 which he received were cast by persons who knew that he was dead.
4. The provisions of the general election law contained in sec. 34, Stats. (1898), relating to the filling of vacancies caused by declination, death, or other disability of a nominated candidate, are not imported into the primary election law or made applicable to primary elections, although sec. 11—25, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 25), declares that the provisions of the general election law in relation to the manner "of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with" the primary election law.
5. The death, before a primary, of one of several candidates for a party nomination at such primary does not create a "vacancy" which can be filled by the party committee either before or after such primary.

TIMLIN, SIEBECKER, and KERWIN, JJ., *dissenting*, are of the opinion that under the provisions of sec. 34, Stats. (1898), made applicable to primary elections by sec. 11—25 (Supp. 1906), the votes cast for the deceased candidate for nomination under the circumstances above stated must be counted and returned, and if they are greater in number than the votes cast for any other candidate no nomination is made at such primary, but a vacancy exists which is to be filled by the party committee under sec. 11—13 (Supp. 1906).

THIS SUIT is brought originally in this court to compel the defendant to certify the name of the relator to the different county clerks of the state as the candidate to be placed upon the official ballot of the Republican party for the office of attorney general, to be voted for at the general election to be held in November, 1910. The complaint alleges that a primary election was held in Wisconsin on September 6, 1910; that more than thirty days prior to the holding of such election, the relator and Frank T. Tucker and Henry A. Gunderson each duly filed in the office of the secretary of state his nomination papers as a candidate for the office of attorney general; that thereafter and within the time required by law the secretary of state transmitted to each county clerk a list containing the name and postoffice address of each person whose nomination papers had been filed in his office and was entitled to be voted for at the primary, together with the designation of the office for which he was a candidate and the party or principle which he represented; that among the names so transmitted were those of the relator and of said Tucker and Gunderson; that thereafter and ten days before the holding of the primary election the county clerks of the respective counties caused the names so certified to be printed upon the official ballot and distributed; that thereafter, on September 1, 1910, said Frank T. Tucker died.

"That notwithstanding the death of said Frank T. Tucker, one C. H. Crownhart, a prominent supporter of one of the factions in the Republican party, of which faction said

Tucker, when in life, was a member, sent one hundred and sixty-nine different telegrams, addressed to one hundred and sixty-nine different prominent supporters of said faction in different parts of the state of Wisconsin, of which the following is a sample:

" 'FRED E. OLEN, Madison, Wis., 9—3—'10.

" 'Florence, Wis.

" 'Fine steam ahead. Few days more and La Follette will sweep state. Fight hard for legislature and state officers. We can win complete victory. Urge votes for Tucker. Committee can fill vacancy. Get evidence of any corruption for use later. Reports are fine. Telegraph this message to active workers every precinct. C. H. CROWNHART.'

"That before the holding of said primary, and especially and particularly on September 2 and 3, 1910, it was generally stated and published in the different newspapers throughout the state that said Tucker was dead and that in case that he received the greatest number of votes at said primary, the Republican state central committee could fill the vacancy, and that such statements were, in substance, also recited in circular letters, which circular letters were addressed to many parts of the state, and a true and correct copy of said circular letters is in the words and figures following, to wit:

" 'PROGRESSIVE REPUBLICAN.

" 'La Crosse, Wis., Sept. 2nd, 1910.

" 'Dear Sir: Every progressive certainly earnestly desires to see Progressive principles triumph in this campaign. To accomplish this Progressive men must be nominated to make our laws in nation and state and to enforce them as state officers.

" 'Herewith will be found a sample ballot on which an X is printed after the names of candidates whom we believe to be thoroughly progressive. No attempt has been made to indicate a choice among the candidates for county offices, all of whom are well known in the county.

" 'Frank T. Tucker, candidate for attorney general, is dead, apparently driven to his death by a political conspiracy against him. His name will be on the official ballot and every friend of good government should put an X after it. No true Progressive can vote for either of his opponents.

" 'Let nothing keep you from the polls on Tuesday next.

Go without fail and see that your neighbor goes. You may be certain that every Tory voter will be out and that every influence which money can exert will be at work against Progressive candidates and principles.

"'It is for *you* to decide which shall triumph, men or money. PROGRESSIVE REPUBLICAN COMMITTEE.'"

That on September 26, 1910, the said canvassing board canvassed the returns certified to them, and that as to the office of attorney general said board certified that the whole number of votes cast for the office of attorney general was 168,925, of which the relator received 58,196, said Gunderson received 47,187, and said Tucker received 63,482, and that the scattering votes for such office amounted to 60; that it appeared from the returns that said Tucker received the greatest number of votes cast for the office; that it further appeared from an affidavit on file that said Tucker died on September 1, 1910, and that the death of said Tucker occurred after the ballots used at said primary were printed and after the time for filing nomination papers had expired. The canvassing board then certified that there was a vacancy in the nomination for the office of attorney general, to be filled as provided by law.

The complaint further sets forth that on the fourth Tuesday in September the candidates for the various state offices and for the senate and assembly, nominated by the Republican party at said primary, together with the senators of said party whose term of office extended beyond the first Monday in January, 1911, met and formulated the state platform of said party, and that the members of said platform convention passed a resolution indorsing and recommending C. H. Crownhart as the candidate for the office of attorney general to fill the alleged vacancy; that the state central committee of the Republican party at a meeting held on October 3, 1910, nominated said C. H. Crownhart as a candidate for the office of attorney general on the Republican

ticket to be voted for at the general election to be held on the first Tuesday in November, and certified said nomination to the secretary of state; that it is the duty of the said secretary of state to certify to the county clerks of the different counties of the state, not less than fourteen nor more than twenty days before the general election to be held in November, the name of each person nominated for any office; that said secretary of state claims that there was a vacancy in the candidacy for the office of attorney general and that it was within the power and was the duty of the state central committee to nominate some person to fill such vacancy; and that said secretary has given out that he will certify to the county clerks of the different counties of the state the name of C. H. Crownhart as the person to be placed upon the Republican ticket to be voted for at the general election.

The relief prayed for is that the secretary of state be enjoined from certifying to the several county clerks of the state the name of C. H. Crownhart, or any person other than the relator, as the candidate of the Republican party in Wisconsin for the office of attorney general, and that said secretary of state be commanded to certify the name of the relator as the candidate for said office.

To this complaint the defendant interposed a demurrer on the following grounds: (1) Because the court had no jurisdiction of the subject of the action; (2) because the plaintiff had not legal capacity to sue; (3) because it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action.

The cause was argued and submitted on October 10, 1910.

For the plaintiff there was a brief by *Olin & Butler,* and oral argument by *J. M. Olin.*

For the defendant there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and *Walter D. Corrigan,* of counsel, and oral argument by *Mr. Jackson* and *Mr. Corrigan.*

On October 15, 1910, the following decision and dissent were filed:

PER CURIAM. The following propositions are decided in this case:

(1) The provisions of the general election law contained in sec. 34, Stats. (1898), relating to the filling of vacancies caused by the declination, death, or other disability of a nominated candidate, are not imported into the primary election law and hence do not apply to primary elections.

(2) Under the allegations of the complaint it must be held that the fact of the death of Mr. Tucker was brought home to the knowledge of the great mass of the electors of the state before the holding of the primary, and that the great majority of the electors who placed a cross opposite his name upon the primary ballot did so with such knowledge.

(3) Votes which are in form cast for a deceased person by voters who know the fact of his decease cannot be considered as votes for or against any person, but must be regarded as so much blank paper.

(4) It follows that under the allegations of the complaint the relator received the greatest number of votes cast at the primary as a Republican candidate for the office of attorney general, and under subd. 1 of sec. 18 of the primary law is entitled to have his name placed upon the official ballot as such candidate.

Demurrer overruled, and judgment ordered for relator for relief by injunction as prayed in the complaint.

SIEBECKER, KERWIN, and TIMLIN, JJ. (*dissenting*). We are of the opinion that sec. 34, Stats. (1898), pertaining to general elections is made applicable to primary elections. The legislature provided in the primary election law (sec. 25, ch. 451, Laws of 1903) that:

"The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls,

the challenging of voters, the manner of conducting elections, *of counting the ballots and making return thereof,* and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections." (Italics ours.)

This section in terms makes sec. 34, Stats. (1898), relating to general elections, applicable to primary elections, and therefore the following provision, in cases where a candidate for nomination on the official ballot at such election dies, governs this case:

"If the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality the vacancy shall be filled as in case of vacancies occurring by death after election." Sec. 34, Stats. (1898).

Under these provisions the votes cast for Mr. Tucker are legal ballots and must be counted and returned, and when so counted and returned the result shows that neither of the other candidates for nomination for the office of attorney general of the state received as great a number of votes as were cast for him, hence the relator is not entitled to have his name placed on the official ballot as the nominee of his party.

The defendant moved for a rehearing and also moved that Supreme Court Rules 37–41, relating to motions for a rehearing, be suspended. The latter motion was denied October 25, 1910; and the motion for a rehearing was denied December 6, 1910.

The following opinions were filed December 6, 1910:

BARNES, J. The exigencies of this case called for a speedy decision thereof, so the mandate of the court was filed in advance of the time at which the decision would have been announced had the ordinary course been pursued. Before the opinion of the court was prepared, a motion for a rehearing was made, and thereafter, and within the time prescribed by

the rules of the court, a brief was filed in support of such motion. The delay in filing this opinion was due largely to the fact that such motion was pending and undetermined. Nothing was said in the brief filed on the motion for rehearing which changed the conviction of the court that its former judgment was correct. With these explanatory remarks by way of introduction, we proceed to state the reasons which impelled the court to reach the conclusion which it did.

The first and second grounds of demurrer were not urged upon this court. The action was brought by the relator after the attorney general refused to institute the same and after leave was granted by this court, and there is no want of capacity to sue on the part of the relator and no lack of jurisdiction in this court to hear and decide the cause on its merits.

The defendant contends (1) that at common law the votes cast for Mr. Tucker were not nullities, but should be counted, and that he having received a plurality of the votes cast, and being dead, there was a vacancy which should be filled in some lawful manner; and (2) that by virtue of sec. 25, ch. 451, Laws of 1903, being the primary election law, the provisions of sec. 34, Stats. (1898), pertaining to the conduct of general elections were incorporated into the primary law, and that under the terms of said sec. 34 the votes cast for Mr. Tucker should be counted, and a vacancy resulted if he received more votes than any other candidate.

1. Assuming that sec. 34, Stats. (1898), has no application to the case, we think there was no vacancy for two reasons: (a) Because of a provision in the primary election law itself, and (b) because under the common law votes knowingly cast for a dead man cannot be counted.

(a) Sec. 18 of the primary law provides:

"The person receiving the greatest number of votes at a primary as the candidate of a party for an office, shall be the candidate of that party for such office, and his name as such

candidate shall be placed on the official ballot at the following election." Sec. 11—18, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 18).

We do not think that a dead man is a "person" within the meaning of this statute. The word "person" as it is ordinarily used means a living human being. It is so defined in Webster's and in Johnson's and in the Century dictionaries. It is so defined by the courts. *Sawyer v. Mackie,* 149 Mass. 269, 21 N. E. 307; *U. S. v. Crook,* 5 Dill. 453, 25 Fed. Cas. 695, 697; *Morton v. W. U. Tel. Co.* 130 N. C. 299, 41 S. E. 484; *Caldwell v. Wallace,* 4 Stew. & P. (Ala.) 282, 285; *Morrill v. Lovett,* 95 Me. 165, 169, 49 Atl. 666. In the latter case it is said: "The natural and obvious signification of the word 'person' in a statute is a living human being." Both the Maine and Massachusetts courts significantly say that when statutes refer to one who is dead they speak of him as a "deceased person" or a "person deceased."

It would seem ridiculous to place any other interpretation on the statute under consideration, because it expressly provides that the *person* receiving the greatest number of votes at the primary shall be the candidate, and that *his name shall be placed on the election ballot.* The legislature did not intend that if a dead man received a plurality of the votes cast he became the candidate of the party and that his name must go upon the ballot, to be voted for at the ensuing general election. If the word "person" as used in the statute means a living human being, then the relator satisfies the call of the statute in every particular. He is the *person* who received the greatest number of votes at the primary.

(b) It is well settled that where electors vote for an ineligible candidate without knowledge of his disqualification, and such candidate receives a plurality of the votes cast, his disqualification does not result in electing the candidate receiving the next highest number of votes. In such a case the votes cast for the ineligible candidate must be counted, and

there is a vacancy in the office instead of an election of the candidate receiving less than a plurality of the votes. *State ex rel. Dunning v. Giles,* 2 Pin. 166; *State ex rel. Off v. Smith,* 14 Wis. 497; *State ex rel. Holden v. Tierney,* 23 Wis. 430; 1 Dillon, Mun. Corp. (4th ed.) § 196; Cooley, Const. Lim. (7th ed.) 931; Naar, Suffrage & Elections, 163; *Barnum v. Gilman,* 27 Minn. 466, 8 N. W. 375; *Opinions of Judges,* 38 Me. 597; *People ex rel. Crawford v. Molitor,* 23 Mich. 341; *Saunders v. Haynes,* 13 Cal. 145; *People ex rel. Furman v. Clute,* 50 N. Y. 451; *State ex rel. Hardwick v. Swearingen,* 12 Ga. 23; *State ex rel. Goodell v. McGeary,* 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; *In re Corliss,* 11 R. I. 638, 23 Am. Rep. 538, 544; *Comm. ex rel. McLaughlin v. Cluley,* 56 Pa. St. 270, 273; *Dryden v. Swinburne,* 20 W. Va. 89, 137.

The cases where the death of the candidate voted for took place before the polls closed on election day are not numerous. The courts that have passed upon the question hold that, where the electors cast their ballots for a dead man, in good faith and in ignorance of his death, the votes should be counted, and that if the decedent received a plurality of the votes cast there was no election. So held in *State ex rel. Sheets v. Speidel,* 62 Ohio St. 156, 56 N. E. 871, and in *Howes v. Perry,* 92 Ky. 260, 17 S. W. 575. In each of these cases the candidate died on election day before the polls closed, and there was no way in which it could be ascertained how many votes for him were cast before his death and how many afterwards.

There is a third class of cases in which the votes were cast for a candidate known to be dead or disqualified or for a fictitious person. The great current of authority is to the effect that such ballots are ineffectual for any person and cannot be counted in determining the result of the election. The English cases almost uniformly so hold. *King v. Hawkins,* 10 East, 211; *King v. Parry,* 14 East, 549; *Gosling v. Veley,*

7 Q. B. Rep. 406; *Trench v. Nolan,* 2 Moak's Notes, 711; *Reg. ex rel. Mackley v. Coaks,* 3 El. & Bl. 249; *Rex v. Monday,* 2 Cowp. 530; *Rex v. Foxcroft,* 2 Burr. 1017. Our own court, in *State ex rel. Holden v. Tierney,* 23 Wis. 430, 435, said that if the "person voted for had been a fictitious person, and this appeared on the face of the ballot, it might be said that the canvassers could reject it, and consider the ballot as being only for the real persons whose names were on it. This might have been done if one of the persons had been, as Lord CAMPBELL suggested in *Reg. ex rel. Mackley v. Coaks, supra,* 'the man in the moon.'" The foregoing excerpt cannot be regarded as passing upon the question even inferentially. The New York court holds that the "knowledge [*i. e.* of the disqualification] must be such, or the notice brought so home, as to imply a wilfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He [the voter] must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied." *People ex rel. Furman v. Clute,* 50 N. Y. 451. Approved in *Barnum v. Gilman, supra,* and in *People ex rel. Sherwood v. State Board of Canvassers,* 129 N. Y. 361, 374, 29 N. E. 345.

It is held in Indiana that, where voters at an election either know as a matter of fact, or are bound to know in law, of the ineligibility of a candidate, the election does not result in failure, but the eligible candidate receiving the highest number of votes is legally elected. So it was decided that voters were chargeable with knowledge that the office of mayor was a judicial one, and that therefore under the constitution such officer during his term was not eligible to hold any office other than a judicial one. *Gulick v. New,* 14 Ind. 93, 77 Am. Dec. 49. It is said in this case that the main purpose of elections is to elect candidates to office, and that where

votes are knowingly cast in such a way that this end cannot be effected, the votes are powerless to prevent the election of any other person. Other Indiana cases to the effect that votes cast for a candidate who is ineligible cannot be counted are *State ex rel. Morley v. Johnson,* 100 Ind. 489, and *Copeland v. State ex rel. Davis,* 126 Ind. 51, 25 N. E. 866. These cases, however, have been modified by later decisions, and it is now held that, unless there is knowledge of the ineligibility on the part of the voter at the time he casts his ballot, the candidate receiving less than a plurality of the votes cast is not elected. *State ex rel. Clawson v. Bell,* 169 Ind. 61, 82 N. E. 69; *Hoy v. State ex rel. Buchanan,* 168 Ind. 506, 81 N. E. 509; *State ex rel. Heston v. Ross,* 170 Ind. 704, 84 N. E. 150. The Maryland court at an early day decided that votes cast for an ineligible candidate were thrown away even though the voters were ignorant of the disqualification, and that the eligible candidate receiving the greatest number of votes was elected. *Hatcheson v. Tilden,* 4 Harr. & McH. 278.

Cases intimating that votes cast with knowledge of the ineligibility of the candidate for whom they are cast should not be counted are *Comm. ex rel. McLaughlin v. Cluley,* 56 Pa. St. 270, 274; *Howes v. Perry,* 92 Ky. 260, 17 S. W. 575; *Gill v. Mayor, etc.* 18 R. I. 281, 27 Atl. 506; and *Saunders v. Haynes,* 13 Cal. 145.

The contrary rule was adopted by the St. Louis court of appeals in *State ex rel. Herget v. Walsh,* 7 Mo. App. 142, where it is held that votes cast for a candidate with knowledge of his death should be counted against the other candidates. This case is approved in *Sheridan v. St. Louis,* 183 Mo. 25, 81 S. W. 1082, 2 Am. & Eng. Ann. Cas. 480, although there was no question of knowledge involved in that case. As far as we can discover, the Missouri court stands alone on the question.

The great weight of authority, English and American, is to the effect that votes knowingly cast for a candidate who can-

not possibly exercise the functions of the office if elected, are thrown away, and it seems to us that this should be so. Elections are held for the purpose of selecting officers, not for the purpose of creating a vacancy to the end that the place may be filled by appointment or even by a new election. The function of the voter is to express an affirmative choice of some person; not to content himself with merely expressing his disapproval of certain candidates. If a vote for a man known by the voter to be dead can be counted, then a vote for a stick or a stone or for "the man in the moon," as is said in the English cases, should be counted. It is true that in this country the majority rules, but the majority should not pursue a policy of mere negation. If the majority should contumaciously persist in voting for candidates notoriously ineligible, it might not be possible to fill the office at all. The illustration may be somewhat far-fetched, but instances have occurred in England where an ineligible candidate for member of parliament received a majority of the votes cast at election after election, and such occurrences are by no means impossible in this country. Besides, there can be no affirmative choice by the electors unless a new election is provided for and held. Either the Republican state central committee or the governor must select the new candidate, if there is a vacancy in the instant case. It may be that a single officer or a committee consisting of a couple of dozen members could make a selection that would be more acceptable to the majority in the present instance than would be the candidate for whom over 56,000 votes were cast, but conditions might easily change so that the contrary would be true.

It is argued that the court cannot assume that any considerable vote, or in fact any vote, was cast for Mr. Tucker by electors who knew of his death at the time they voted, and that therefore the rule as to votes cast for an ineligible candidate with knowledge of the fact of ineligibility does not apply. The complaint does not aver actual knowledge of

Mr. Tucker's death on the part of a sufficient number of electors to give him a plurality of the votes cast. It sets up the facts from which knowledge is to be inferred, if inferred at all. The facts are admitted by the demurrer. It is only by proving such facts as are alleged that the relator could show knowledge at all, on the part of the electors, because it would be impossible to subpœna several thousand voters to testify as to how they voted and as to whether or not they knew of Mr. Tucker's death if they voted for him. Before such an inquiry could be concluded another primary election would have come and gone, and the delay and expense attendant on it would work a denial of justice. Mr. Tucker was a candidate for an important office in a more or less acrimonious campaign where factional lines were closely drawn. The complaint shows that the fact of his death was generally stated and published in newspapers throughout the state, as well as the fact that if he received the greatest number of votes at the primary the state central committee could fill the vacancy, and that such statements were repeated in circular letters addressed to many parts of the state, a sample copy of which will be found in the statement of facts. In addition to this 169 telegrams were sent out by a prominent supporter of one of the factions in the Republican party to 169 different prominent supporters of said faction, in different parts of the state, calling upon them to urge voters to vote for Tucker, and advising them that the committee could fill the vacancy. Thus, through the medium of the press and by means of telegrams and circular letters, the members of the faction in the party to which Tucker in his lifetime belonged were advised to vote for him notwithstanding his death. We think the court would be justified in assuming that a great majority of the electors of Wisconsin read one or more newspapers. Since the advent of rural free delivery the daily newspaper finds its way into the country districts with very little loss of

time in transmission. News is disseminated rapidly. With the newspapers publishing the fact of Mr. Tucker's death, and the well known tragic circumstances under which it occurred, and the members of the wing of the party with which he affiliated vigorously calling on its supporters to vote for him regardless of that fact, it may fairly be assumed that the electorate of Wisconsin was very generally informed of his death on election day. Certainly we think a court should find on the admitted facts that enough votes were cast for Mr. Tucker by electors who knew he was dead when they cast them to give him a plurality over the relator; or, in other words, that at least 5,287 of the 63,482 persons who voted for him knew he was dead when they so voted.

2. It remains to be determined whether what we find to be the common-law rule has been modified by statute. The following provisions are the only ones which have any material bearing upon the subject:

Sec. 13 of the primary election law reads:

"Vacancies occurring after the holding of any primary shall be filled by the party committee of the city, district, county or state, as the case may be." Sec. 11—13, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 13).

Sec. 25 of the primary election law reads:

"The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections." Sec. 11—25, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 25).

Sec. 34, Stats. (1898), relates to holding general elections and provides that any person nominated for an office may decline in the manner therein prescribed. The statute then

provides how a new candidate may be nominated in case of the death or declination of a nominee before the ballots are distributed. The statute further provides:

"If such declination, death or the permanent removal of a nominee take place after the ballots are printed and before election, the proper chairman of the committee of the political organization of which such candidate was the nominee may make a nomination to fill the vacancy and provide the election boards with pasters containing the name of such nominee only, which shall be pasted upon each of the official ballots by the ballot clerks, before signing their initials thereon and delivering them to voters. If the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality the *vacancy* shall be filled as in case of vacancies occurring by death after election."

As will be observed, sec. 25 of the primary law makes the provisions of law in force when it was enacted, in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting ballots and making return thereof, and *all other kindred subjects,* applicable to all primaries in so far as they are consistent with the primary election law. The section then recites that it is its intention to place the primary under the protection and regulation of the laws in force pertaining to elections. It is argued that this provision incorporates sec. 34, Stats. (1898), into the primary law, and that, inasmuch as Mr. Tucker died after the ballots were printed, the votes cast for him should be counted and there is a vacancy by reason of his death, he having received a plurality of the votes cast. There are a number of reasons why we think sec. 34 is no part of the primary election law.

We should have as little confusion as possible in our statute law. Where the attempt is made to incorporate parts of a former law into one that is being presently made, the language used should be such as to indicate with a reasonable degree of

certainty what was in the legislative mind. A careful and intelligent reading of the two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new. People are obliged to obey the laws, and in order that they may do so they should be put in a position where they can ascertain what they are. A study of the two sections convinces us that the legislature never intended that sec. 34 should have any application to a primary election.

In the first place the legislature made a special provision in the primary election statute (sec. 13) pertaining to the filling of vacancies. It is reasonable to suppose that when it undertook to specifically legislate on the subject of vacancies it did so fully. The legislature also had in mind the general provisions of the election law, because such law is referred to and its provisions are adopted so far as consistent with the primary law. The special provision found in the primary law in reference to the filling of vacancies is wholly redundant if it was intended to incorporate sec. 34 into the primary law. Sec. 34 deals specifically with matters arising after party nominations are made, and sec. 13 deals with matters arising after the primary election to nominate candidates is held. Sec. 34 of the general statute fully covers the subject that is covered by sec. 13 of the primary election law.

Again, sec. 34 relates in terms only to a person already nominated by a party, and it provides for the filling of a vacancy when one happens, by giving the party committee of that party power to fill it. This is logical, because the party committee is the executive arm of the party and very properly should represent it in such an emergency. But before the primary there is no party nominee. True, there may be several persons whose names have been properly put forward by nomination papers and who are thus entitled to have their names on the primary ballot, but these nominating signers have no executive committee recognized by law to act for

them. It must frequently happen that these persons nominated before a primary represent factions in the party, and, in all probability, one at least represents a faction whose object it is to overthrow the faction which has control of the party and is represented by the party committee. Now, if sec. 34 be imported into the primary law, the party committee, under its terms, would be authorized to fill a vacancy occurring in the leadership of the party faction which was endeavoring to defeat and supplant the faction to which the committee belonged. This seems absurd. It is logical and sensible to enact that the party committee shall act for the party as a whole, because it represents the party. It is neither logical nor sensible to enact that a party committee shall act for a faction of the party or a mere group of party members, because it does not represent the faction or group. Indeed, it may be fighting such faction or group with all its power.

Another inherent difficulty in the way of holding that sec. 34 is a part of the primary law is the fact that we must supply words therein and eliminate words therefrom in order to make it applicable, which it is the function of the legislature to eliminate or supply rather than of the courts. The last sentence of sec. 34 is the only one that can have any application to the facts presently before us:

"If the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality the vacancy shall be filled as in case of vacancies occurring by death after election."

The "nominee" referred to in sec. 34 is the person who has received the party nomination for an office. If the section is part of the primary law we shall have to substitute for the word "nominee" the words "candidate for the nomination." The clause "and no nomination shall be made as herein provided," found in said sentence, can have no possible application to a primary election. The provision quoted recites that

the vacancy is to be filled as in case of vacancies occurring by death after election. It would be absurd to say that this part of the law could apply to primary elections, unless we interpolate words therein that wholly change its meaning. A vacancy in the office of attorney general occurring after election is filled by appointment by the governor. Now, the legislature could not have intended that the governor should fill a vacant place on a party ticket. That would enable him to name candidates for parties with which he was not affiliated and in whose success he had no interest and whose defeat he earnestly desired. This interpretation of the law would place him in a position where he might have the naming of a rival candidate if he were himself seeking a re-election. So we must either lop off this part of the sentence or supply words from some other statute so as to place the appointing power elsewhere. It should be just as permissible to amputate the first part of the sentence as it is the last, and if either can be eliminated we see no good reason why a combination of words found in the middle that make a complete sentence when standing alone may not be lifted out of sec. 34, or any part of the general election law for that matter, and be transported into the primary law. The possibilities of adding to the primary law in this way, as occasion arises, are boundless, but this method of lawmaking is too indefinite and uncertain to receive judicial sanction.

Again, sec. 34 provides for filling a *vacancy* caused by the death or declination or permanent removal of the party candidate. The death of Mr. Tucker created no vacancy. In the event of the death of a nominee of a political party there is a hiatus in the election ticket of the party nominating him, which very properly should be filled. The word "vacancy" conveys to the mind the idea of a place once filled but not so any longer. The primary election is held to enable the electors to select one of the few or many candidates who may invite the favorable consideration of the electors as a fit repre-

sentative of the party for some particular office. To say that, if there are ten candidates of a party for one office, and one of them dies before the primary is held, there is a vacancy, seems illogical. So long as there is presented to the electors one or more eligible candidates for their suffrage, how can it be said that there is any vacancy in the primary ballot? The primary election presents a very different situation from the general election. At the latter each party presents one, and only one, candidate for each office, and if he dies after nomination his place must be filled or the party can have no candidate. The primary is a free-for-all, where any member of a party, by getting the requisite number of signers to his nomination papers, may do his best to convince his fellow party men that he is the logical candidate who should be selected by the party for a place on the election ballot. But if death overtakes him before the primary is held, and there are other patriots who are not only willing but anxious to secure the prize, we fail to see where there is any vacancy.

Indeed, the defendant, in the brief filed on the motion for a rehearing, frankly makes concessions which coincide with the view above expressed. His counsel say:

"It is perhaps true that a 'declination' or 'death' before the primary may or may not create a vacancy; for instance, where there are several candidates for the 'office of Republican nominee,' *the declination or death of one would perhaps create no such vacancy as is contemplated by this provision. The legislature had no such situation in mind as more than one candidate of a single party for an office.* It had the general election in mind where there is but one party candidate. *It had in mind a vacancy occurring at or during a convention, or thereafter when there was an organized party committee.* Before the primary, it is possible there is no vacancy by the declination or death of one of several candidates. There is no party committee representing a particular candidate among the several. *Hence there is force to the argument that the vacancy which can be filled under this provision by party committee is one occurring or found to exist when the primary is over.*"

Counsel seek to avoid the apparent difficulty by proceeding to read or construe the troublesome provision as not being applicable to the primary law. Counsel have not favored us with their views as to how sec. 34 should be reconstructed so as to meet the case in hand. By generously carrying out the algebraic processes of elimination, by substitution and by addition and subtraction, it is possible to so remold sec. 34 as to make it fit this case; but we do not think the legislature intended that we should do so or that the citizen should be obliged to go through such a process to determine what the statute law of the state is. We fail to see how the word "vacancy" can be stricken from the statute, if it is to retain any life that would be helpful to the defendant, because it is only where a vacancy occurs that action can be taken by the party committee.

It may be said that sec. 13 of the primary law authorized the Republican state central committee to make a nomination under the facts before the court, although it was not seriously contended in the briefs of counsel or on the oral argument that such was the case. Unless a vacancy occurred after the primary was held, sec. 13 has no application. Mr. Tucker died and his supporters voted for him before the primary election was over. If the death of or the casting of votes for the deceased, or both, caused a vacancy, it did not occur "after the holding of any primary." If a vacancy occurred after the primary was held, it must have been because the votes were counted after the election. It is not apparent how the counting of votes can create a vacancy. If there was one, it was because the electors voted for a dead candidate. We have already given our reasons why the electors cannot create a vacancy by voting for a man known to be dead when the votes are cast.

TIMLIN, J. (*dissenting*). Frank T. Tucker, Henry A. Gunderson, and the relator were lawfully upon the official primary or nominating election ballot as candidates for the Re-

publican nomination for the office of attorney general. This primary election was held on September 6, 1910. After the official primary election ballots had been printed and on September 1, 1910, Mr. Tucker came to his death by drowning. No nomination was made to fill his place, but his name remained on the official primary election ballot. The fact of his death was widely known before the primary election, and, besides, a large number of telegrams and circular letters were sent out to the electors advising and urging them to vote for Tucker notwithstanding his death, and stating in effect that if a plurality of votes were so cast there would be created a vacancy which could be filled by the Republican state central committee. The state canvassing board on September 26, 1910, canvassed the vote of the primary election and found the votes for the several candidates for the Republican nomination for attorney general to be as follows: Levi H. Bancroft 58,196 votes, Henry A. Gunderson 47,187 votes, and Frank T. Tucker 63,482 votes; scattering, 60 votes. They further certified to the death of Tucker on September 1st after the ballots used at the primary were printed and after the time had elapsed for filing nomination papers, and that there existed, in consequence of the foregoing, a vacancy in the nomination for this office. On October 3d the Republican state central committee met and nominated C. H. Crownhart as a candidate for this office, and certified to the secretary of state his name as the candidate of the Republican party for the office in question at the ensuing election. The secretary of state now threatens and intends to certify to the several county clerks for a place on the official ballot the name of C. H. Crownhart as the Republican candidate for the office of attorney general. The figures certified concerning the vote for the several candidates are the true figures. The relator, on the other hand, contends that on the above showing there is no vacancy to be filled, that the votes cast for Mr. Tucker are void and cannot be counted, and that he is lawfully entitled

to be placed on the official election ballot as the candidate of said party for said office.

It has long been the law of this state that "the fact that the candidate who receives the highest number of votes is ineligible does not render the votes cast for him void, nor is the person receiving the next highest number, though eligible, to be regarded as legally elected or entitled to the office." *State ex rel. Dunning v. Giles,* 2 Pin. 166, 52 Am. Dec. 151, and cases in note. That case has been followed and approved by this court. *State ex rel. Off v. Smith,* 14 Wis. 497; *State ex rel. Holden v. Tierney,* 23 Wis. 430; *State ex rel. Guernsey v. Meilike,* 81 Wis. 574. This rule is in harmony with the great weight of authority elsewhere in this country. *Barnum v. Gilpin,* 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; *Howes v. Perry,* 92 Ky. 260, 17 S. W. 575, 36 Am. St. Rep. 591; *State ex rel. Goodell v. McGeary,* 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; *Sheridan v. St. Louis,* 183 Mo. 25, 81 S. W. 1082; 10 Am. & Eng. Ency. of Law (2d ed.) 758. But it is contended by relator that death of a candidate cannot be considered as ineligibility within this rule. The contrary is, however, decided in *State ex rel. Herget v. Walsh,* 7 Mo. App. 142; *State ex rel. Sheets v. Speidel,* 62 Ohio St. 156, 56 N. E. 871; and *Howes v. Perry, supra,* and I have found no precedent for such distinction. Neither is such distinction supported by reason.

Whether in the absence of a statute the rule above quoted is inapplicable in a case where the voters, at and prior to the time of voting, knew of the ineligibility of the candidate receiving the greatest number of votes need not be decided, because we have in this state a statute covering the identical question. "If the nominee die after the ballots are printed, and no nomination shall be made as herein provided, the votes cast for him shall be counted and returned, and if he shall receive a plurality the vacancy shall be filled as in case of vacancies occurring by death after election." Sec. 34, Stats.

(1898). The "nomination to be made as herein provided" refers to the following provision: "If such . . . death . . . of a nominee take place after the ballots are printed and before election, the proper chairman of the committee . . . may make a nomination to fill the vacancy." Sec. 34, Id. These statutes last quoted were in force prior to and at the time of the adoption of the primary election law (ch. 451, Laws of 1903), hereinafter quoted, and are still in force. They related when adopted, and now relate, to the official general election ballot. Sec. 25, ch. 451, Laws of 1903, provides:

"The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, *of counting the ballots and making return thereof,* and all other kindred subjects, shall apply to all primaries in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections."

Ch. 451, Laws of 1903, consists of twenty-eight sections, and contains nothing inconsistent with the provisions of sec. 34, Stats. (1898), hereinbefore quoted, with reference to the counting of ballots for a deceased candidate and making return thereof. On the contrary, sec. 18 of ch. 451 expressly provides that "the person receiving the greatest number of votes at a primary as the candidate of a party for an office, shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election." It thus excludes the relator, because he did not receive the greatest number of votes, and it is only by treating votes which the statute law requires to be counted and returned as mere waste paper that the majority of the court arrived at the conclusion that the relator did receive the greatest number of votes.

This opinion might stop here, because it seems to me that

on the face of these statutes it is so clear that he who runs may read that the ballots cast for Tucker must be counted and returned. If by command of the statute they are counted and returned, that alone brings the case within the rule of *State ex rel. Dunning v. Giles*, 2 Pin. 166, 52 Am. Dec. 151. Ballots required by the statute to be counted and returned cannot be said to be mere waste paper. They still serve to show that the other candidates were not elected, and this is the reason the statute requires them to be counted and returned. A moment's reflection on the application of this sec. 34 to the general election law will disclose this purpose of the law. The purpose cannot be different when applied to the primary election. If it were not for this statute, in case the candidate of the majority party died under the circumstances mentioned the candidate of the minority party might be entitled to the office although he received only a minority of the votes cast. The statute does not go upon knowledge of the death on the part of the voter, and no such exception can be read into the statute. How my brethren fell into this error is easily seen. They found in this sec. 34 a provision that if the dead candidate, as shown by the count and return of the ballots cast for him, had received a plurality, the vacancy must be filled as in case of vacancies occurring by death after *election*. They first refused to consider the last word "election," taken with ch. 451, Laws of 1903, as quoted, equivalent to primary election, when the question before the court related to primary election. This is their first error, because they are by this statute last referred to required to apply to the primary election all the laws relating to the general election. The primary election law does contain provisions for filling a vacancy after the primary election. Sec. 13, ch. 451, Laws of 1903 (sec. 11—13, Stats.: Supp. 1906). "Vacancies occurring after the holding of any primary shall be filled by the party committee of the city, district, county or state, as the case may be." Having refused this interpretation, they were

still, in order to determine the case for relator, obliged to further refuse to consider the provisions of sec. 34 for counting and returning the vote separable from the provision for filling the vacancy, notwithstanding the statute requires the application to the primary election of all parts of sec. 34 not inconsistent with the primary election law. Finding in other statutes that the vacancy on an official general election ballot caused by death must be filled after election by appointment by the governor, they reject the whole of sec. 34 as applicable to the primary election. This is contrary to established law. The form of statute which adopts and applies to a new subject matter the requirements of a pre-existing statute "so far as consistent," "so far as applicable," "where applicable," "so far as practicable," is very common. Illustrations from Wisconsin Statutes of 1898: Secs. 864, 874, 1150, 1151, 4651, and there are no doubt many others. From Revised Statutes of U. S.: Secs. 721, 914, 1891. Whenever such statutes come before the court, the provisions applicable or consistent or practicable are never rejected merely because there are found in the statute so adopted other provisions inapplicable, impracticable, or inconsistent. The very form of the adopting statute is sufficient to establish this proposition. But the authorities are numerous. 26 Am. & Eng. Ency. of Law (2d ed.) 714; *State ex rel. Spaulding v. Elwood,* 11 Wis. 17; *State ex rel. Saar v. Hundhausen,* 26 Wis. 432; *Jenkins v. Morning,* 38 Wis. 197; *Chappell v. U. S.* 81 Fed. 764; *Nunes v. Wellisch,* 75 Ky. 363; *Lownsdale v. Portland,* 1 Oreg. 381; *Stark v. Starrs,* 6 Wall. 402.

Speaking of this subject in *In re Wood's Estate,* L. R. 31 Ch. Div. 607, it is said:

"Now what is the legal effect of the ninth section of the act of 1855, which brings into that act those sections of the former act? It is to put them into the act of 1855, just as if they had been written into it for the first time. If a subsequent act brings into itself by reference some of the clauses

of a former act, the legal effect of that, as has often been held, is to write these sections into the new act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later act, you have no occasion to refer to the former act at all."

To the same effect is *Turney v. Wilton,* 36 Ill. 385, 393, where it is said:

"Whenever an act of the legislature confers powers which are recited in another act, the act to which reference is made is to be considered and treated as if it were incorporated into, and made a part of, the act which contains the reference."

In *Jones v. Dexter,* 8 Fla. 276, it was said:

"Where a statute has been enacted with special reference to a particular subject, and by another statute its provisions are directed in general terms to be applied to another subject of an essentially different nature, the adopting statute must be taken to mean that the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the new subject."

No liberality of construction need be invoked by defendant. By these statutes his contention is upheld *strictissimi juris.* The majority opinion might be compared in point of liberality of construction with that in *Neacy v. Milwaukee Co., post,* p. 210, filed on the same day. The relator has not received the greatest number of votes at the primary election, consequently placing him upon the official ballot as the candidate of the Republican party for the office in question is contrary to the command of the statute (sec. 18, ch. 451, Laws of 1903). The secretary of state was within his legal duty in certifying the name of Mr. Crownhart as the Republican candidate for this office.

I am instructed to say that Mr. Justice SIEBECKER and Mr. Justice KERWIN concur in this opinion.

WEST, Administrator, Respondent, vs. BAYFIELD MILL COMPANY, Appellant.

October 27—December 6, 1910.

Master and servant: Death caused by unguarded gearing: Assumption of risk: Contributory negligence: Duty of master: Statute construed: Instructions to jury: Prejudicial errors: Evidence.

1. In an action for death of an employee who was caught in a bevel gearing located under and operating a live-roller table in defendant's sawmill, the jury was warranted by the evidence in finding that the gearing had not been safely guarded because of the manner in which a short hemlock board (which constituted the guard) was put in place and fastened to the table, considered in connection with the forces which tended to displace such board while the mill was in operation.
2. Under sec. 1636*jj*, Stats. (Supp. 1906: Laws of 1905, ch. 303), an employee does not assume the risk of an unguarded gearing by continuing to work around the same after knowing of its existence; and this rule applies to a case where the guard is temporarily displaced without the master's knowledge, if such removal was due to its being insecurely fastened in the first instance.
3. Contributory negligence is a matter of defense and the burden is upon the defendant to establish it by affirmative evidence unless it is shown by the plaintiff's proofs.
4. Although the board constituting the guard for the gearing had, to the knowledge of the deceased, become displaced about half an hour before the accident, it not appearing that he had appliances at hand to fasten it back, and there being evidence tending to show that he was occupied with his work all the time and had no authority to shut down the mill, which might have resulted from his leaving his place, he was not guilty of contributory negligence as a matter of law in failing to replace the guard or to notify the master that it was off, but the question was for the jury. *Blahnik v. Central C. Co.* 142 Wis. 167, distinguished.
5. Sec. 1636*j*, Stats. (1898), requiring that dangerous shafting and gearing be securely guarded, does not impose on the employer the duty to insure an employee's safety against all possibility of injury, as is implied in an instruction that employees "should be secure against danger of violence while performing their work." TIMLIN, SIEBECKER, and KERWIN, JJ., dissent.

6. The employer discharges his duty under the statute when (1) he uses ordinary care and prudence in determining whether the gearing or shafting is so situated as to be dangerous to employees while performing their duties, and decides the question as ordinarily careful and prudent employers under like circumstances, in the honest exercise of their judgment, would decide it; and (2) when, the shafting or gearing being such as is required to be guarded, he provides as effective a guard as ordinarily careful and prudent employers, under like circumstances, would and do deem it their duty to furnish. TIMLIN, SIEBECKER, and KERWIN, JJ., dissent.
7. The one exception to the last proposition is that if the guard as ordinarily furnished be obviously dangerous it will not be deemed sufficient.
8. Unless the employer has reasonable ground to believe that an accident might happen to the employee while performing his work, he is not at fault in failing to provide a guard; and in providing one where required the measure of his duty is ordinary care. TIMLIN, SIEBECKER, and KERWIN, JJ., dissent.
9. Where the facts are such that the jury might have found either way upon the question whether gearing was securely guarded within the meaning of the statute, an instruction which in effect makes the employer an insurer of the safety of his employees is clearly prejudicial and ground for reversal, even under ch. 192, Laws of 1909 (sec. 3072*m*, Stats.).
10. There being no claim in this case that it was not feasible to guard the gearing in question, evidence that a sheet-iron covering might have been used instead of the hemlock board, and that such guard could have been fastened on the roller bed and would not have interfered with the use of the machine, was incompetent. [Whether the admission of such evidence was a material error, not decided.]

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action is brought by plaintiff as administrator of the estate of Philip La Pointe, deceased, to recover damages for the death of said La Pointe, resulting from injuries received by coming in contact with an exposed gearing in defendant's sawmill.

On June 10, 1908, La Pointe was an employee of the defendant, and in the performance of his duties was required to

work alongside of a live-roller table, the purpose of which was to carry lumber, slabs, etc., from a bandsaw situated at one end thereof. The table consisted of a series of rollers about three feet apart, between each of which there was a decking of boards running lengthwise, set in a wooden frame of four-by-twelve timbers, the table being about twenty feet long, two and a half feet high, and three and a half feet wide. At the side of the table and just below the top there was a shaft extending the entire length thereof, which shaft connected with the rollers by means of bevel gearings. This lateral shaft was driven by a bevel gearing at the top of a perpendicular shaft extending up through the mill floor, such gearing being about eight inches in diameter. The deceased was caught in the gearing at the intersection of the two shafts. The mechanism here involved is practically the same as that described in the opinion of the court in *Hoffman v. Rib Lake L. Co.* 136 Wis. 388, 117 N. W. 789. It appears from the testimony that up to a short time previous to the accident the gearing upon which plaintiff was injured was covered by a six-inch hemlock board, three feet long, nailed to the edge of the roller table and possibly to two-by-fours at either end of such board. The jury found that negligence on the part of the defendant was the proximate cause of the injury and that the deceased was not guilty of any want of ordinary care, and assessed plaintiff's damages at $4,750. From a judgment rendered upon such verdict defendant appeals.

For the appellant there was a brief by *Thomas M. Kearney,* of counsel, and *Lamoreux, Shea & Cate,* attorneys, and oral argument by *Mr. Kearney* and *Mr. Burdette F. Williams.*

For the respondent there was a brief by *H. W. Dietrich,* attorney, and *John Jenswold, Jr.,* of counsel, and oral argument by *Mr. Dietrich.*

BARNES, J. The grounds for reversal urged in this case are that the court erred (1) in refusing to hold that the de-

fendant was not negligent; (2) in not holding that the plaintiff was guilty of contributory negligence; (3) in charging the jury in various particulars; and (4) in admitting incompetent evidence prejudicial to the defendant.

1. In reference to the first error, it is said that the gearing was safely guarded within the meaning of sec. 1636*j*, Stats. (1898), and the fact that the guard had become displaced and so remained for half an hour on the day of the injury, and had also become displaced for a few minutes the day before, was not sufficient to charge the defendant with knowledge of any infirmity therein. There is no claim that the defendant had any actual knowledge that the guard was off on either occasion. We do not find any evidence in the case tending to show that the guard was not a safe appliance, if we assume that it had been properly and sufficiently fastened, and we do not think that the jury would be warranted, on the facts shown, in finding that the defendant was chargeable with knowledge of the fact that the guard was not in place on the occasions referred to. We do think that the jury might have found from the evidence that the gearing was not safely guarded in the first instance, because of the manner in which the guard was put in place. The guard was an inch board, the upper edge of which was nailed to another inch board that formed part of the table, and the upper edge of the guard board came up flush with and really formed part of the top of the table. The guard board was not fastened at the bottom, and there was evidence from which the jury might have found that the ends were not fastened, although there was considerable evidence to the effect that it was nailed at the ends to the two-by-four boards upon which the top of the table rested. The evidence further tended to show that employees in the performance of their work had occasion to lean against the guard in such a manner as to spring the lower portion of it inward, and that slabs, cants, and other material passing down the table came in contact with the upper edge of the guard board in

such a manner as to have a tendency to unloose it from the table proper. The guard had become unloosed the day before the injury occurred. We conclude that a jury question was presented by the evidence, and that the jury was warranted in finding that the gearing was not safely guarded, because of the manner in which the guard was fastened, considered in connection with the character of the forces that were exerted upon it while the mill was in operation.

2. It is next urged that the deceased knew half an hour before he was injured that the guard had become detached, and, knowing this fact, continued at his work and thereby assumed the hazard. The obvious answer to this contention is that under the provisions of sec. 1636*jj*, Stats. (Laws of 1905, ch. 303), an employee does not assume the hazard of an unguarded gearing by continuing to work around the same after he knows of its existence. *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770; *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 187, 120 N. W. 839. But it is argued that sec. 1636*jj* should not be held to apply to a case such as this, where the master had provided a sufficient guard in the first instance which had become temporarily displaced, and from which displacement injury resulted before the master had any knowledge, actual or constructive, of the displacement. We cannot agree to this construction or read any such exception into the statute. The jury found that the defendant was negligent in not safely guarding the gearing in the first instance, as required by sec. 1636*j*, Stats. (1898), and we have already said that there was evidence to support such finding and also a finding that such negligence was the proximate cause of the injury. Sec. 1636*jj* clearly exculpates the employee from that species of contributory negligence known as assumption of hazard in such a case, although it does not cover other phases of contributory negligence. *Lind v. Uniform S. & P. Co., supra,* and cases cited.

3. It is further argued that the deceased was guilty of

other phases of contributory negligence aside from assumption of hazard. No one saw the deceased when he was first caught in the gearing, and just what he was doing or how he happened to be caught rests in conjecture. Certainly there is no testimony in the case showing that he became entangled in the gearing because of some act of negligence of which he was guilty at the time he was injured. Contributory negligence being a matter of defense, the burden was upon the defendant to establish the same by affirmative evidence, unless it was shown by the evidence offered by the plaintiff, and there was no such proof in the case.

But it is urged that the deceased knew that the guard was provided for his protection as well as for the protection of other employees of the defendant; that he knew it had become displaced half an hour before the injury occurred; that he knew that in the performance of his duties he was required to work in close proximity to this gearing a very considerable part of the time; that he knew this exposed gearing was exceedingly dangerous, and that he had the right to suppose that the master would immediately replace the guard as soon as it had knowledge that such guard was off; that the contrivance was a simple one, consisting of a board three feet long and six inches wide that could be temporarily put back in place by the servant without difficulty, and that the deceased was guilty of contributory negligence in failing to notify the master when he knew that the guard was off or else in failing to put the same back in place. There would be little doubt that these facts would defeat a recovery under the doctrine of *Howard v. Beldenville L. Co.* 129 Wis. 98, 114, 108 N. W. 48; *Yezick v. Chicago B. Co.* 138 Wis. 342, 120 N. W. 247, and other cases, were it not for secs. 1636*j* and 1636*jj* of our statutes. Where reasonably safe machinery has been furnished to the employee, which becomes out of repair during its operation, and the master has no knowledge of that fact and has had no reasonable opportunity to acquire such knowledge and

remedy the defect, while the servant, with knowledge of the danger, continues in his employment, the servant is generally held to have assumed the risk. But we have already said that the servant does not assume the risk of an unguarded gearing even where the guard has become displaced and the master has had neither actual nor presumed knowledge of the defect, provided the gearing was not safely guarded in the first instance. The appellant relies on the case of *Blahnik v. Central C. Co.* 142 Wis. 167, 125 N. W. 317, as holding that the deceased was negligent in failing to either replace the guard or to notify the master that it was not in place, and, in so far as the facts of the case are identical with those of the present case, the decision is in point. There the plaintiff's intestate was killed by being caught in unguarded gears and drawn into rapidly revolving drums, and the alleged negligence of the defendant consisted in failure to provide a suitable guard for the gearings and other machinery. It appeared, however, that a suitable guard had been provided which was temporarily out of place; that the deceased, an oiler, was at times called upon to assist in making repairs; that the guard could be put back in place without difficulty; that it was extremely dangerous to oil the machinery in the absence of the guard; that deceased had ample time in which to replace the guard; and that if he desired he might shut down the machinery while he was oiling it. In the case before us it does not appear that the deceased had the appliances at hand to fasten the guard back in place. There was evidence tending to show that he was occupied with his work all the time and that he was "kept on the jump" at least a part of the time. He apparently had no authority to shut down the mill. The character of his work was such that if he left his place of employment to hunt up the foreman or millwright, the mill might have to cease operations until his return; for aught we know he might have been subject to censure or even to discharge had he pursued such a course. It was not shown that

the deceased was advised that he might leave his place of work to search out some person in authority for the purpose of notifying that person of the sudden danger to which he was subjected. The facts of the two cases are quite dissimilar. In the *Blahnik Case* it was obviously the duty of the employee to put the guard in place before proceeding to oil the gearing. It is by no means obvious that the deceased either should have replaced the guard here or notified the master so to do. The question of decedent's negligence was for the jury to determine in the instant case. It is true that the master here furnished a guard which would have protected the deceased had the same remained in place, and that the master had no knowledge that the guard had become displaced, while the servant had, and it may seem somewhat extreme to hold the master liable under the circumstances. But if the master was originally at fault in failing to securely fasten the guard which it provided, it must suffer the consequences of such negligent act.

4. The first question in the special verdict was as follows:

"Did the defendant ever securely guard the gearing of the machine at which the deceased, Philip La Pointe, was injured before said accident?"

In reference to this question the court charged the jury, among other things:

"By securely guarding it is meant that the defendant should guard the gearing safely, that the persons who work about the building *should be secure against danger or violence while performing their work.*"

Exception was taken to the portion of the charge quoted and error is predicated thereon.

We will first consider whether the charge was erroneous, and, if it was, then whether it was prejudicial. The language used is not qualified in any way elsewhere in the charge. We think the jury would naturally understand from this charge that it was the defendant's legal duty to so guard this gearing

that injury to an employee could not result therefrom. The language of the court is that the gearing should be so safely guarded that the employee *"would be secure against danger or violence while performing his work."* Even though the guard was an ordinarily safe one, or an extraordinarily safe one for that matter, still, if injury or violence resulted therefrom, then the guard was unsafe under the instruction. The instruction practically made the defendant an insurer of the employee against injury from the gearing. It has been decided by this court that this is not a correct statement of the duty of the defendant under sec. 1636*j*, Stats. (1898). This section as construed by this court does not require the employer to insure his employees' safety against the possibility of injury, nor does it require of him infallibility nor omniscience. It requires him first to decide whether the gearing is so situated as to be dangerous to employees in the discharge of their duty, and, second, to securely guard or fence it if dangerous. He must use ordinary care and prudence in deciding the first question, and decide it as ordinarily careful and prudent employers under like circumstances, in honest exercise of their judgment, would decide it. If such an employer could reasonably apprehend that injury might result to an employee in the discharge of his ordinary duties from the unguarded gearing, then it is dangerous and must be guarded, and he must also proceed to furnish such a guard, or at least as effective a guard as such ordinarily careful and prudent employers under like circumstances would and do deem it their duty to furnish. This is a secure guard within the meaning of the law. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153. The only exception to the last proposition is that if the guard so ordinarily furnished be obviously dangerous it will not be deemed sufficient. *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689.

In the *Guinard Case* the plaintiff was injured by a revolv-

ing shaft which was not guarded. The statute then in force (subd. 2, sec. 1636*f*, S. & B. Ann. Stats.) required shafting to be securely guarded if so located as to be dangerous to employees while engaged in performing their ordinary duties. The precise question presented was whether the master was negligent in failing to guard, and, of course, involved his duty under the statute in this regard. This court held that it was reversible error not to charge the jury unqualifiedly that "if the defendant furnished a place which was as safe and free from danger as other persons of ordinary care engaged in like business and under like circumstances ordinarily furnish, then you will find for the defendant on such fact." The above quoted instruction was given and held to be correct, but the judgment was reversed because the trial court added these qualifying words: "But not if you find that places provided by such other employers of labor for their workmen or servants are not reasonably safe places in which their men are obliged to work." The court, after some considerable discussion of the question, holds that an employer is bound to exercise ordinary care only in guarding machinery which the statute provides must be guarded.

In *Powalske v. Cream City B. Co., supra,* the plaintiff was injured by coming in contact with an unguarded shaft, which is one of the appliances specifically named in sec. 1636*j*, Stats. (1898). In that case the court said:

"The statute does not require every shaft in a factory to be guarded or fenced, but only such as are so located as to be dangerous to employees in the discharge of their duties. It does not hold the owner of a factory, where machinery of the kind it mentions is used, bound to anticipate every possible danger to his employees that may in any event exist therefrom by reason of its being unguarded. The statute must have a reasonable, sensible construction. It plainly contemplates that persons required to comply with its provisions shall exercise ordinary judgment in determining whether machinery should be guarded, and that, in such exercise, they shall bring to bear

upon the subject ordinary prudence and intelligence under the circumstances of each particular case."

Continuing, the court holds that, unless the employer had reasonable ground to apprehend that an accident might happen to the employee while engaged in performing his work, there was no breach of duty in failing to provide a guard.

There can hardly be any justification for the claim that, while the employer must exercise only ordinary care in discovering whether a gearing or a shaft should be fenced or guarded, yet, having discovered that a guard must be put in place, such guard must afford an absolute protection to the employee at all times and under all circumstances when he is engaged in the line of his employment. If only ordinary care is required in the first place in discovering a defect, ordinary care is all that is necessary in guarding it.

If this rule be wrong, then the court was wrong in holding in *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770, that, while sec. 1636*jj*, Stats. (Laws of 1905, ch. 303), took away the defense of assumption of hazard where sec. 1636*j*, Stats. (1898), had been violated, still the "employer's right to the defense of other phases of contributory negligence" was not taken away; and the court was in error again in approving of this decision in *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839.

If it be the duty of the master to insure the employee against danger from an unguarded gearing, and to make it so safe that the employee cannot get hurt therein, then the servant has a perfect right to rely on this legal duty and to assume that it will be performed, and in the nature of things he cannot be guilty of any act of negligence that would defeat a recovery. He might, as against any kind of a guard, manage to injure himself if he set about to do so, but this would not be negligence. The principle involved is very closely analogous to the principles held applicable to the common-law duty of an employer to furnish to an employee a safe place to

work. That duty is to furnish a place reasonably safe; *i. e.* a place as safe and free from danger as other persons of ordinary care and prudence in like business and under like circumstances ordinarily furnish, subject only to the limitation as to obviously unsafe places above indicated. *Jensen v. Hudson S. Co.* 98 Wis. 73, 79, 73 N. W. 434; *Prybilski v. Northwestern C. R. Co.* 98 Wis. 413, 74 N. W. 117; *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064; *Sladky v. Marinette L. Co.* 107 Wis. 250, 251, 83 N. W. 514; *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689. So the true rule, subject to the limitation referred to, is that, if the employer furnish such a guard as is in general use among employers of ordinary caution in the same line of business and under the same circumstances, he has discharged the duty imposed upon him, and the guard so furnished is in a legal sense reasonably safe and the dangerous machinery has been securely guarded within the meaning of the statute. This rule of law requires the master to exercise ordinary care in providing a guard or fence for such machinery as is required to be guarded or fenced. That given by the trial court required something beyond even extraordinary care, in that it held him liable if injury resulted. There are cases in which the trial court has referred to the language of sec. 1636*j* without attempting to explain the meaning thereof. There are cases in which this court has done likewise. But in no case in this court, where the question was squarely raised and presented, has the court decided that the rule established by the cases cited herein is not good law, and in no case has it been said that machinery and appliances are not securely guarded when the owner exercises the degree of care in reference thereto called for by the established rule. We conclude that the trial court erred in giving the instruction under consideration.

The judgment should not be reversed, however, unless it appears that the erroneous instruction has affected the substantial rights of the defendant. Ch. 192, Laws of 1909

(sec. 3072*m*, Stats.). Did it do so? At best, the question was a close one as to whether the defendant was guilty of any act of negligence in providing the guard in question. The defendant strenuously contends in this court that the evidence does not support the finding of the jury in this behalf. The court submitted the first question to the jury presumably because it dealt with a disputed question of fact, and we are satisfied that upon the evidence the jury might well have found that the defendant was free from negligence. So we have a vital question in the verdict on which the jury might have found in favor of either party. It seems to us that the instruction, in effect, took this question from the jury and left it nothing to decide, if the jury paid any heed to it, and in view of the conclusion reached this court cannot say that the instruction was not a controlling factor with the jury. If the machine should be so guarded that the deceased would be "secure against danger or violence," then clearly the defendant was at fault, because the deceased was injured by reason of the failure of the master to provide a guard that would protect him. The process of reasoning by which the jury would naturally reach the conclusion which it did is simple, direct, and well nigh obvious: The master should have provided a guard that would have prevented the injury. He did not do so. Therefore he did not perform his duty by properly guarding the gear. A contrary conclusion could not well have been reached unless the jury wholly disregarded the instruction. The prejudice that might result from the instruction was further emphasized by the receipt of testimony, against objection, showing that a sheet-iron guard could be placed over the gearing and securely fastened without impairing the usefulness of the machinery. If an erroneous instruction can be regarded as prejudicial in any case, we fail to see any escape from the conclusion that the error we are considering was substantial and that there must be a new trial because of it. The cases of *Bodenheimer v. C. & N. W. R. Co.*

140 Wis. 623, 123 N. W. 148; *Ripon H. Co. v. Haas,* 141 Wis. 65, 123 N. W. 659; and *Schumacher v. Tuttle P. Co.* 142 Wis. 631, 126 N. W. 46, were all decided since ch. 192, Laws of 1909 (sec. 3072*m,* Stats.), was enacted, and the conclusions reached in those cases show that judgments are still reversed in this court for giving erroneous instructions, when they are prejudicial, and for refusing to give proper and material instructions when requested.

5. The witness Elfstrom testified that the gearing could have been guarded by using a sheet-iron covering instead of hemlock boards; that such a guard could have been fastened on the roller bed; and that so fastened it would not have interfered with the use of the machine. The evidence was objected to and exception taken to the rulings of the court holding it competent. The evidence was not competent and should not have been received. Where the master insists that it is not feasible to guard dangerous machinery at all, it is held admissible to show that a guard was provided after injury resulted from the exposed machinery. *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839, and cases cited. Such evidence is receivable for no other purpose than to show that the machinery might have been guarded. But it is not competent to show that some kind of a guard should have been used which in the judgment of a witness might be more efficient than that provided. So long as the master uses the ordinary appliances commonly used by ordinarily prudent men, and has disobeyed no law of the land, he has fulfilled his duty, unless, perchance, such appliances are obviously dangerous. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064; *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27, 30, 71 N. W. 814; *Jensen v. Hudson S. Co.* 98 Wis. 73, 73 N. W. 434; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563; *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689. No claim was made in this case that the gearing could not be guarded. The appel-

lant did provide a guard for the gearing and contends that it discharged its full duty in so doing. It is unnecessary to decide whether the court would consider the error of sufficient materiality to work a reversal of the judgment. As the case must be sent back for a new trial for other reasons, the error can be readily avoided on another trial.

Other errors are argued, none of which affect the plaintiff's cause of action. As the questions are not likely to arise on a subsequent trial of the cause, we refrain from discussing them.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

The following opinion was filed December 13, 1910:

TIMLIN, J. (*dissenting*). Sec. 1636*j*, Stats. (1898), provides:

"The owner or manager of every place where persons are employed to perform labor shall surround every stationary vat, pan or other vessel into which molten metal or hot liquids are poured or kept with proper safeguards for the protection of his employees, and all belting, shafting, gearing, hoists, fly-wheels, elevators and drums therein which are so located as to be dangerous to employees in the discharge of their duty shall be securely guarded or fenced."

The particular provision of the foregoing statute applicable to the instant case is:

"All . . . gearing . . . so located as to be dangerous to employees in the discharge of their duty shall be securely guarded or fenced."

It seems quite plain that if the gearing is in fact such gearing as the statute describes, viz., one so located as to be dangerous to employees in the discharge of their duty, the duty to guard or fence it is mandatory; and the manner in which it shall be guarded or fenced is in like case covered by manda-

tory statute, viz., it shall be "securely guarded." There should be no great difficulty in the construction of such a statute if we approach it with judicial equanimity. There is no contention in this case that the statute makes the employer an insurer. There is no contention that it takes away the defense of contributory negligence. Panic on these two propositions, self-suggested, seems to be responsible for the extraordinary construction first attempted to be given to this statute in *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, and returned to and revived with additional and accumulated error by the majority opinion in the instant case, notwithstanding many cases in this court later than the *Guinard Case* and inconsistent therewith. Is there any novelty or hardship in holding a person liable for failure to discharge a statutory duty if such failure is the proximate cause of an injury to another for whose safety the statutory duty was imposed? Speaking of the same statute it was held in *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, a case later than the *Guinard Case*, and strangely enough not referred to in the majority opinion in the instant case:

"The statute of this state requires all gearing so located as to be dangerous to employees when engaged in their ordinary duties to be securely guarded so as to be safe to such employees in such employment. If the sprocket wheel was so located as to be dangerous to plaintiff while engaged in his ordinary duties, unless guarded in some proper way, then the statute applies and the absence of the guard was negligence *per se*."

If this is the law, then the opinion of the majority is not law, and it must be apparent to every one, layman or lawyer, that this latter case conforms to the statute, while the majority opinion in the instant case does not. The majority opinion in the instant case puts forward as an excuse for departing from the statute that otherwise the venerable and valuable defense of contributory negligence might or would be excluded and that otherwise the statute might make the em-

ployer an insurer of the safety of his employee. These twin specters of the imagination are also disposed of by former cases in this court.

"This court has distinctly held that where the law requires some particular thing to be done by a person to guard the personal safety of others, a failure to perform the duty so imposed constitutes actionable negligence at the suit of a person of that class, injured by such failure of duty, without contributory negligence on his part. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041." *Klatt v. N. C. Foster L. Co., supra.* See, also, *Sharon v. Winnebago F. Mfg. Co.* 141 Wis. 185, 124 N. W. 299.

Speaking of an ordinance cognate in character to this statute this court said:

"If there was such an ordinance and it was valid, it was error to leave the question to the jury to say whether a violation thereof constituted negligence." *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 358, 85 N. W. 1036, and cases cited.

Many other cases will be found cited in these opinions. So that the doctrine is neither novel nor dangerous, nor does it exclude the defense of contributory negligence nor make the master an insurer. The majority in the instant case simply frightened themselves without cause. Quoting again from *Klatt v. N. C. Foster L. Co., supra:*

"True, it is sometimes said that the omission of a statutory duty is not negligence *per se,* but only evidence of negligence. That rule applies only where the injury caused is not within the scope intended to be guarded against by the statutory requirement, as in cases of injuries to persons, contributed to by failure to fence railway tracks, the primary purpose of which is to prevent injuries to cattle and other domestic animals. *Schmidt v. M. & St. P. R. Co.* 23 Wis. 186. In *Union P. R. Co. v. McDonald, supra* [152 U. S. 262], and *Hayes v. M. C. R. Co., supra* [111 U. S. 228], the distinction is clearly pointed out between cases where omission of a statutory duty is negligence *per se,* and where evidence of negligence only."

This is also in conflict with the majority opinion in the instant case.

In *Van de Bogart v. Marinette & M. P. Co.* 132 Wis. 367, 106 N. W. 805, an instruction to the jury concerning the statute in question and containing this sentence was approved:

"The failure to guard or fence a set-screw on a shaft so located as to be dangerous to employees while in the discharge of their duty would be negligence."

This, as I understand it, makes the negligence of the employer a matter of law, provided the shafting is so located, and therefore that decision is in conflict with the decision in this case. Given a shaft so located as to be within the calls of the statute, if the failure to guard it is negligence *per se,* or if the duty to guard it is a duty imposed by law, then it follows that it is no excuse for the defendant that other persons also disregard this legal duty or commit other acts which also constitute negligence *per se.*

In *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694, judgment for the plaintiff was affirmed notwithstanding this instruction given to the jury:

"The law requires that the employer shall securely guard or fence shafting which is so located as to be dangerous to employees in the discharge of their duties, and if you find that the shafting in question, under all the facts and circumstances proven, was so located as to be dangerous to the plaintiff in the discharge of his duties in the line of his employment at the time of the injury to him, you should answer this question 'No.' "

The question so peremptorily directed to be answered in the negative was this: "Was such place so furnished by the defendant a reasonably safe place in which to do his work?" Here is a direct instruction making it a matter of law that the place was unsafe if the shaft was so located as to be dangerous to employees in the discharge of their duty and unguarded. This is also the necessary result of the decisions

in *Reffke v. Patten P. Co.* 136 Wis. 535, 117 N. W. 1004; *Hoffman v. Rib Lake L. Co.* 136 Wis. 388, 117 N. W. 789; and *Miller v. Kimberly & C. Co.* 137 Wis. 138, 118 N. W. 536, all cases resting on this statute. In *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342, the court said:

"What would constitute a reasonable guarding of an elevator entrance under the circumstances *was determinable with reference to the mandate of the statute that it must be securely guarded. Nothing short of that would be a reasonable guarding.*"

This is also in conflict with the opinion in the instant case. Now if we compare what was said by this court in these decisions with what was said by the court below in the instant case to the jury for which the judgment below was reversed, not selecting a detached sentence from the instructions below as is done in the majority opinion, but giving the context, we will find that the instruction given by the court below was but a paraphrase of the foregoing language quoted from this court in *Klatt v. N. C. Foster L. Co., supra; Van de Bogart v. Patten P. Co., supra; Walker v. Simmons Mfg. Co., supra;* and *Anderson v. Horlick's M. M. Co., supra.* The instruction in the instant case in the court below was as follows:

"The law requires the employer of labor, where the laborer is required to work about dangerous gearing which is so located as to be dangerous to the workmen, to securely fence or guard the same. It was the duty under this statute for the defendant to securely guard the gearing of the machine in question. The evidence of the plaintiff, the plaintiff claims, tends to prove that the defendant was guilty of negligence in not complying with the law in this respect. The defendant claims that its evidence tends to prove that the gearing of the machine in question was securely guarded. *By securely guarding it is meant that the defendant should guard the gearing safely, that the persons who work about the gearing should be secure against danger or violence while performing their work.* The statute in relation to this question reads as follows:" (Reads statute to the jury.)

That sentence from the foregoing instruction criticised by the majority opinion, and for the giving of which the judgment was reversed, in substance means, and could only be taken to mean, that by "securely guarding it" is meant the defendant should securely guard the gearing in question. It is not very instructive, but at the same time it is not harmful or misleading. Great stress is laid on the closing words of the sentence, "that persons who work about the gearing should be secure against danger or violence while performing their work." It is said, unfairly I think, that this makes the master an insurer of the safety of his servant. To me it merely says that a secure guard is one so constructed that persons who work about the gearing should be secure against danger or violence while performing their work. Not a very enlightening or accurate definition, it is true, but it will compare very favorably with many definitions found in the reports of this court. I can see no harm in this extemporaneous attempt of the circuit court. The plain meaning of the whole instruction is not that the employee should be secure against danger or violence from other things than the unguarded gearing, and not that he should be secure against danger or violence from this latter in case of his contributory negligence, because the question of contributory negligence was also separately submitted to the jury under proper instructions. If circuit judges are to be held down to such technicalities in instructing the jury, and judgments reversed for the use of language in such instructions which is the substantial equivalent of the language used by this court in its opinions on the same subject, we are extending mere technicalities beyond reason and disregarding ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), because it cannot be fairly said that any jury could be misled by the subtile and hypercritical distinctions which might be traced out between the language employed by the circuit court in this case and the disposition of the same subject in the above cited decisions of this court. Compare it with the ex-

cerpt from *Anderson v. Horlick's M. M. Co., supra,* above quoted, or the excerpt from *Klatt v. N. C. Foster L. Co., supra.* I do not remember to have ever seen an opinion of a court of last resort containing so many erroneous statements of law as the majority opinion in the instant case. Setting forth some of these as illustrative and quoting from the opinion as approved by the majority and filed:

"It [the statute] requires him [the employer] first to decide whether the gearing is so situated as to be dangerous to employees in the discharge of their duty, and, second, to securely guard or fence it if dangerous. He must use ordinary care and prudence in deciding the first question, and decide it as ordinarily careful and prudent employers under like circumstances, in honest exercise of their judgment, would decide it. If such an employer could reasonably apprehend that injury might result to an employee in the discharge of his ordinary duties from the unguarded gearing, then it is dangerous and must be guarded, and he must also proceed to furnish such a guard, or at least as effective a guard as such ordinarily careful and prudent employers under like circumstances would and do deem it their duty to furnish. This is a secure guard within the meaning of the law. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153. The only exception to the last proposition is that if the guard so ordinarily furnished be obviously dangerous it will not be deemed sufficient. *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689. . . . So the true rule, subject to the limitation referred to, is that, if the employer furnish such a guard as is in general use among employers of ordinary caution in the same line of business and under the same circumstances, he has discharged the duty imposed upon him, and the guard so furnished is in a legal sense reasonably safe and the dangerous machinery has been securely guarded within the meaning of the statute."

Observe, first, that the opinion departs from the ancient and long established rule of this court that the standard of care by which the conduct of the person accused of negligence is tested "is such care as the great mass of mankind ordinarily exercise under the same or similar circumstances." *Nass v.*

Schulz, 105 Wis. 146, 81 N. W. 133; Simmons, Wis. Dig. 2475 and cases. In the majority opinion negligence is measured by the care which employers ordinarily exercise. If employers are to be thus privileged, why not measure the plaintiff's care by the care which the great mass of employees ordinarily exercise under the same or similar circumstances? Again, employers as a class have duties imposed upon them by this statute. All employers is a large class and necessarily includes "employers of ordinary caution in the same line of business and under the same circumstances." So that if employers of ordinary caution, etc., disregard this statute and set it at naught, or even if all employers disregard the statute and set it at defiance, each one when sued for damages may escape under this decision by proving that the others did not comply with the statute. This grants an extraordinary class privilege. It nullifies the statute if employers wish to nullify it. I regard this as a wholesome statute, and I believe it is generally so regarded. How can the legislature ever enact statutes which shall be sufficient for the amelioration of the condition of the laboring men, or to lessen the annual slaughter of employees engaged in the manufacturing industries, if such statutes are to be whittled away by construction in this manner. I say whittled away, because the decision places the liability of an employer with reference to dangerous machinery precisely upon the same ground that it would occupy at common law in the absence of this statute. But I do not wish to be understood as stating that the opinion would be correct if the writer had used the words above quoted from *Nass v. Schulz* instead of the word "employers." It would be wrong in the former case and worse in the latter. No person can excuse his noncompliance with statutory duties on the ground that in the effort to obey the statute he exercised "such care as the great mass of mankind ordinarily exercise under the same or similar circumstances."

"However rigidly a court may uphold the right of a master to follow general usage, it is clear that evidence of a custom

to disregard a law requiring employers to use an appliance calculated to preserve their servants from some particular danger can never be admissible where the question of the exercise of due care on the employer's part is raised." 1 Labatt, Mast. & Serv. § 47, citing *Cayzer v. Taylor,* 10 Gray, 274, 69 Am. Dec. 317.

It does not, however, require authority to support such a self-evident proposition. Yet the opinion criticised will bear no other reasonable construction than that an employer commanded by sec. 1636*j*, Stats. (1898), to cover a gearing in fact located as therein described, is not absolutely required to do so, but only to decide whether the gearing is so situated and use ordinary care and prudence in so deciding, and decide it as ordinarily careful and prudent employers under like circumstances, in honest exercise of their judgment, would decide it. This means that the employer might urge in justification of his disregard of this statute that he honestly decided not to cover the gearing because he thought it not so located as to be dangerous, although as a matter of fact it may be so located, and that he did so as ordinarily careful and prudent employers under like circumstances, in honest exercise of their judgment, would decide it. He and they decide upon what is their duty under the statute. Next, the statute says that the gearing shall be securely guarded, but the opinion says No, that the employer is only required to furnish "at least as effective a guard as such ordinarily careful and prudent employers under like circumstances would and do deem it their duty to furnish." This results in giving to a class designated in a statute as the subjects of regulation the right to determine the diligence of its own members by comparisons among themselves, and thus to decide whether or not they will comply with the statute, and whether or not, having arrived at the conclusion that a guard is required, they will conform to the statute and provide a secure guard, or merely one which they and others of their class "would and do deem it their

duty to furnish." This is, to say the least, extraordinary. It is neither good law nor justice nor good sense. Then again, the majority opinion contains this statement:

"If such an employer could reasonably apprehend that injury might result to an employee in the discharge of his ordinary duties from the unguarded gearing, then it is dangerous and must be guarded."

But only a few months ago this court said, speaking of the same statute:

"The law is cast in general terms. We cannot interpolate into it the word 'ordinary,' and test appellant's conduct by a different standard than the legislature, in the proper execution of its police power, created. Such limitation upon the duty to guard as might be indicated by the word 'ordinary' . . . the legislature manifestly did not intend should exist, from the fact that the word was industriously, by amendment [in 1898], dropped from the law as it formerly existed; the words 'discharge of their duty' being substituted for 'engaged in their ordinary duties.'" [*Miller v. Kimberly & Clark Co.* 137 Wis. 138, 142, 118 N. W. 536.]

We who are capable of a record like this should view with a good deal of liberality and charity the shortcomings of our brethren of the circuit bench. Speaking of the prejudicial effect which the criticised instruction in the instant case must have had, the majority opinion goes on to say:

"The process of reasoning by which the jury would naturally reach the conclusion which it did is simple, direct, and well nigh obvious: The master should have provided a guard which would have prevented the injury. He did not do so. Therefore he did not perform his duty by properly guarding the gear."

This part of the opinion failed to keep in mind that we had decided that in case the gearing was so located as to be dangerous the failure to cover it was negligence *per se* (*Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563); that there was a finding based upon sufficient or undisputed evidence that the

failure to guard was the proximate cause of plaintiff's injury; and that this court has also decided that "what would constitute a reasonable guarding . . . under the circumstances was determinable with reference to the mandate of the statute that it must be securely guarded. Nothing short of this would be a reasonable guarding." *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342. With these in mind, perhaps the instruction would not have been considered so prejudicial. I cannot too vigorously emphasize the fact that the majority opinion brushes away the statute entirely and places the liability of the master on the same ground and subject to the same limitations and the same defenses as at common law.

I am authorized to say that Mr. Justice SIEBECKER and Mr. Justice KERWIN concur in this dissent.

SOUTHERN FLOUR & GRAIN COMPANY, Respondent, vs. MCGEEHAN and another, Executors, Appellants.

October 28—December 6, 1910.

Sales: Place of delivery: Contract construed: Parol evidence: Failure to deliver: Measure of damages: Inconsistent verdict: Interstate commerce

1. Where a written contract for the sale of chattels at a specified price delivered f. o. b. cars at a certain station provides that, as a mode of securing the seller, he may ship the goods to their destination to his own order, drawing upon the buyer for the amount due and attaching the bill of lading to the draft, the place of delivery, for the purpose at least of fixing the measure of damages for a failure to deliver, is the place specified for delivery f. o. b. cars.
2. Parol evidence of the intention of the parties is not admissible in such a case.
3. The measure of damages for a failure to deliver in such a case is the difference between the price at which the goods were purchased and the market price at the place of delivery.

4. A finding by the jury that the market price of hay at a certain place was the same as the purchase price named in a contract providing for delivery f. o. b. cars at said place, is not inconsistent with a finding that the buyer's damages for a failure to deliver were twenty-five cents per ton, because the latter finding may refer to the value f. o. b., which the former does not expressly cover.

5. A contract of sale made by correspondence between the seller in this state and the buyer in another, providing for shipment of goods from this state to the other, is a transaction of interstate commerce, and the buyer, though a foreign corporation not licensed in this state, may maintain an action here for breach of the contract.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

William F. Shea, for the appellants.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. T. Pray.*

TIMLIN, J. The complaint claimed to recover damages for breach of a contract made in writing on or about October 19, 1906, for the sale to plaintiff of 500 tons of timothy hay to be delivered on or before January 1, 1907, free on board cars at Highbridge, Wisconsin. The evidence relating to the contract and its breach is without dispute. After some correspondence by letter and telegram between the buyer at Atlanta, Georgia, and the seller at Highbridge, Wisconsin, in which the latter demanded a price f. o. b. at Highbridge and also requested the buyer to furnish bank reference, the latter, under date of October 15, 1906, wrote to the seller saying, after some argument concerning the price:

"Therefore on basis of present market we could pay you $10.50 F. O. B. there for 500 tons, shipment in any kind of cars, local or other, and any time by January 1st. . . . We will refer you as references the Lowry National Bank of Atlanta and Bradstreet's Mercantile Agency. We can assure you that you will have no risks in shipping us the hay. You can draw for the full amount of draft, and bill of lading at-

tached, shipping to your own order, notify us. A bill of lading made out in this way assures instant payment of your draft, for the B. L. has to be in our possession before the commodity is acquired."

On October 19th the seller accepted this offer of purchase by telegram, and after receipt of this telegram the buyer on the date last mentioned wrote acknowledging receipt of the telegram and confirming the purchase and sale. The seller made no attempt to deliver, but expressly refused to abide by the contract. The case was submitted to the jury, but the only important finding of the jury, as we view the case, is one fixing the buyer's damages at $125. Because the making of the contract and its breach rested upon undisputed evidence and the contract was in writing its construction was for the court. There was at the time of breach a material difference between the market value of hay at Highbridge and the market value at Atlanta. The trial court construed the contract to require delivery at Atlanta, Georgia, and upon evidence of the market value of hay at that place at the time of breach raised these damages to $1,425 and gave judgment for that sum. This action of the trial court was fairly within the evidence as to amount awarded, and correct if his construction of the writing was correct, otherwise the amount fixed by the jury must stand. It is of course elementary that the construction of a written contract is for the court. Here we have a contract, consisting of offer and acceptance, to pay for 500 tons of hay to be delivered f. o. b. at Highbridge, Wisconsin. This without anything more would fix upon Highbridge as the place of delivery. *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820; *Fromme v. O'Donnell,* 124 Wis. 529, 103 N. W. 3; *State ex rel. Pittsburgh C. Co. v. Patterson,* 138 Wis. 475, 120 N. W. 227; *Murphy v. Sagola L. Co.* 125 Wis. 363, 103 N. W. 1113. But it was also provided that the seller might ship to Atlanta to his own order, drawing upon the buyer for amount of shipment with bill of lading attached to draft, and the buyer must

have this bill of lading in its possession before it could get the hay. This without any more would fix upon Atlanta as the place of delivery. *Doyle v. Roth Mfg. Co.* 76 Wis. 48, 44 N. W. 1100; *Kentucky R. Co. v. Globe R. Co.* 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353; *McLaughlin v. Marston,* 78 Wis. 670, 47 N. W. 1058; *Morrow v. Reed,* 30 Wis. 81; *Greenwood G. Co. v. Canadian County M. & E. Co.* 72 S. C. 450, 5 Am. & Eng. Ann. Cas. 361, and note. These apparently contradictory stipulations in the contract must be harmonized from the instrument itself if possible, because both could not have been intended in this contradictory sense. With reference to the proposal coming from the buyer that the seller might ship the hay to his own order, we find it put forward as a mode of assuring the seller that he would be paid, and as a mode of securing himself rather than as fixing the place of delivery. The whole letter of October 15th, taken with the previous correspondence, will bear no other reasonable construction. We cannot make the provision for delivery f. o. b. Highbridge yield to the latter provision, because the latter not only may have, but apparently from the writing did have, the other purpose of merely securing the seller. Resort to parol evidence of intention is unnecessary and improper in such case. Where the place of delivery is fixed otherwise in the writing, but the seller in this way retains title as security and not as owner until the property arrives at its destination, the place of delivery, for the purpose at least of fixing the measure of damages for failure to deliver, is the place specified for delivery f. o. b. cars. So long as the delivery is a matter of intention this must be the rule. This rule is supported by *E. Hobart & Co. v. Littlefield Bros.* 13 R. I. 341; 1 Benj. Sales (4th Am. ed.) §§ 319, 320; *Bank of Litchfield v. Elliott,* 83 Minn. 469, 86 N. W. 454; *Chamberlain v. Dickey,* 31 Wis. 68; *Hoeffler v. Carew,* 135 Wis. 605, 116 N. W. 241; *Gibbons v. Robinson,* 63 Mich. 146, 29 N. W. 533. The measure of damages being the difference between the price at

which the hay was purchased and its market price at the place of delivery (*Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Marshall v. Clark,* 78 Conn. 9, 60 Atl. 741; *Chapman v. Ingram,* 30 Wis. 290; *Ingram v. Rankin,* 47 Wis. 406, 2 N. W. 755), the damages imposed by the court were unauthorized and those fixed by the jury may stand. The answers of the jury that the market price at Highbridge was $10.50 per ton and that the plaintiff's damages were twenty-five cents per ton are not inconsistent, because the latter may refer to the value f. o. b., which the former does not expressly cover. There is evidence to support the finding of twenty-five cents per ton.

The contract was a transaction of interstate commerce, and the plaintiff was therefore competent to maintain this suit although a foreign corporation and unlicensed. *Catlin & P. Co. v. Schuppert,* 130 Wis. 642, 110 N. W. 818; *Elwell v. Adder M. Co.* 136 Wis. 82, 88, 116 N. W. 882.

Some claim is made that there was no market for hay at Highbridge, but the evidence is wholly insufficient to negative the feasibility of obtaining in the vicinity of Highbridge and of delivering there f. o. b. the required amount of hay.

It follows that the judgment appealed from must be reversed, and the cause remanded with directions to render judgment for the plaintiff on the verdict of the jury. It is understood throughout this opinion that the initial letters f. o. b., whether capitals or small, mean "free on board."

By the Court.—Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

CORRY, Appellant, vs. SHEA, imp., Respondent.

October 28—December 6, 1910.

Tax sales: Time for redemption: Fraudulent conveyance to infant: Statutes construed: Creditors "or other persons."

1. If lands are conveyed to an infant after being sold for taxes and after the time for redemption has begun to run against the adult grantor, such time is extended, under sec. 1166, Stats. (1898), so that the infant may redeem at any time before coming of age or during one year thereafter.
2. But if such conveyance is made without consideration and for the purpose of enlarging the time for redemption, it is void as against the holder of the tax certificate, under sec. 2320, Stats. (1898), which declares void every conveyance "made with the intent to hinder, delay or defraud creditors *or other persons* of their lawful actions," etc.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a general demurrer to the complaint.

For the appellant there was a brief signed by *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn.* Among other authorities they cited *Jones v. Jones,* 64 Wis. 301, 25 N. W. 218; *Pierstoff v. Jorges,* 86 Wis. 128, 56 N. W. 735; *Fallass v. Pierce,* 30 Wis. 443.

William F. Shea, respondent, *in pro. per.,* cited *Metzger v. Hochrein,* 107 Wis. 267, 83 N. W. 308; *Sullivan v. Collins,* 107 Wis. 291, 83 N. W. 310; *Madden v. Kinney,* 116 Wis. 561, 93 N. W. 535; and other cases.

TIMLIN, J. The complaint averred that the above named respondent was the owner of certain described lots and intentionally failed to pay the taxes thereon, whereupon the lots were sold at tax sale to the county of Ashland in the years 1905, 1906, 1907, and 1908 and tax certificates issued. The

plaintiff purchased the first tax certificates on December 22, 1905, and on May 7, 1908, the respondent, with intent to hinder and delay the foreclosure of these tax certificates, conveyed the lots in question without consideration to his infant son. Prayer that the deed of May 7, 1908, be set aside and declared void.

Sec. 1166, Stats. (1898), provides that the lands of minors, or any interest they may have in lands sold for taxes, may be redeemed from tax sale at any time before such minors come of age and during one year thereafter. Persons under no legal disability have three years from sale and until the tax deed is recorded within which to redeem. The tax-sale certificate is a lien against the land, but no debt or personal charge against the owner of the land. The holder of a tax-sale certificate may, after the expiration of three years from the sale, either foreclose his tax certificate or apply to the county clerk for a tax deed thereon. Had the rule applicable to the statute of limitations been followed by this court in the construction of sec. 1166, *supra,* the period of redemption could not be prolonged after the statute had once begun to run against the adult owner by his conveyance of the land to an infant. The prior lien holder could not be hindered by the conveyance to the infant in such case. To such a case the rule of *Hodson v. Treat,* 7 Wis. 263, would apply. But this construction was not given to the statute.

In *Jones v. Collins,* 16 Wis. 594, it was expressly ruled that lands which descended to infants after the lands had been sold for taxes might be redeemed by the infants at any time before they came of age or during one year thereafter. In *Tucker v. Whittlesey,* 74 Wis. 74, 41 N. W. 535, 42 N. W. 101, where it appeared that the ancestor died March 23, 1876, the infant plaintiffs were allowed to redeem from the tax sale of 1874 on which deed was issued December 11, 1877, the tax sale of May, 1875, on which deed was issued May 13, 1878, and the tax sale of May, 1875, on which tax deed was issued

March 6, 1880. All deeds were upon sales made before the death of Tucker, and the limitation of his right to redeem had begun to run against him prior to his death. *Karr v. Washburn,* 56 Wis. 303, 14 N. W. 189, might perhaps be distinguished on the ground that at the time of the sale the infants had an equitable interest in the land unenforceable because of the statute of frauds; but the tax-title holder could not take advantage of this. In *Begole v. Hazzard,* 81 Wis. 274, 51 N. W. 325, the ancestor died and created the parol trust for his children in March, 1877. The children were allowed to redeem from the tax sale of 1874 upon which a deed had been issued in 1878. These cases are cited in *Hoffman v. Peterson,* 123 Wis. 632, 102 N. W. 47, where, however, the infant owned the land at the time of the sale but subsequently conveyed it by warranty deed, and within the year succeeding his majority was allowed to redeem. In *Menasha W. W. Co. v. Harmon,* 128 Wis. 177, 107 N. W. 299, the question was presented in a brief filed, but the court in disposing of the case did not reach it. *Swearingen v. Robertson,* 39 Wis. 462, includes both sheriff's deed and tax deed and applies the ordinary rule, but I do not find that it was since cited or followed. The brief of Hastings & Greene in *Karr v. Washburn, supra,* cited *Swearingen v. Robertson, supra,* to the proposition that the statute of limitations having begun to run against the ancestor would continue to run against the heirs notwithstanding the minority of the latter. But the court did not in that case adopt this view.

In none of the cases, so far as we can discover, was the right of the infants to redeem challenged by pleading on the ground that the conveyance to them was made with intent to hinder, delay, or defraud the tax-certificate holder. If no statute forbade a transfer for the purpose and with the intent of extending the period of redemption from a tax sale, it is probable that in the exercise of the *jus disponendi* the defendant might lawfully do so. He did not owe the tax-title purchaser

the duty owing in equity to a creditor, sometimes expressed as the duty to be just before he is generous. Speaking of a voluntary assignment by an insolvent debtor for the benefit of creditors in which a portion of the creditors was preferred, it was said:

"In the absence of any statute to the contrary, there can be no question but that an insolvent debtor may pay one creditor in money or property in preference to another. *Spring v. South Carolina Ins. Co.* 8 Wheat. 268. This right of the debtor to prefer results from the absolute ownership of property. *Brashear v. West,* 7 Pet. 608. This absolute ownership implies the absolute right of disposition. In the absence of the bankrupt law or any other statute to the contrary, there can be no doubt but that an insolvent debtor, when assigning his property for the benefit of his creditors, may, in good faith, prefer one or more to others." *Lord v. Devendorf,* 54 Wis. 491, 11 N. W. 903; *Landauer v. Vietor,* 69 Wis. 434, 34 N. W. 229.

The question in the case at bar, therefore, is whether the conveyance comes within the purview of sec. 2320, Stats. (1898), which is substantially the ancient English statute against fraudulent conveyances generally adopted and in force in the several states.

"Every conveyance . . . made with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands; . . . as against the person so hindered, delayed or defrauded, shall be void."

The appellant in this action is not a creditor of the respondent. No doubt the words "other persons" in this statute, by a familiar rule of construction, mean other persons of the same general class having rights of action which may be hindered or delayed by a conveyance. 26 Am. & Eng. Ency. of Law (2d ed.) 609, *Ejusdem generis.* Dicta in several cases may be found to the effect that the relation of creditor in such case must be established. *Jones v. Lake,* 2 Wis. 210; *Eaton v. White,* 2 Wis. 292; *Remington v. Bailey,* 13 Wis. 332;

Zahl v. Billings, 118 Wis. 459, 95 N. W. 374; *Ellis v. Southwestern L. Co.* 108 Wis. 313, 84 N. W. 417. But in all these cases the attacking party rested upon his right as creditor, and none of them involved an interpretation of the words "other persons" found in this statute. In *Wilcox v. Fitch,* 20 Johns. 472, a person having a right of action in ejectment, with a claim to recover mesne profits, was held competent to attack a conveyance as fraudulent; in *Stimson v. Wrigley,* 86 N. Y. 332, a city after a tax warrant was levied to collect taxes; in *Berge v. Kittleson,* 133 Wis. 664, 114 N. W. 125, one having a claim for unliquidated damages for breach of promise to marry; in *Pierstoff v. Jorges,* 86 Wis. 128, 56 N. W. 735, the complaining witness in a bastardy proceeding before judgment recovered; in *Jones v. Jones,* 64 Wis. 301, 25 N. W. 218; *S. C.* 71 Wis. 513, 38 N. W. 88, a prospective wife with reference to her right of dower. See, also, *Walradt v. Brown,* 6 Ill. 397.

"It is a mistake to suppose that the statute of Elizabeth only avoids deeds and conveyances coming within its exact provisions as to creditors. The statute is much broader in its operation. It enacts that every conveyance made to the end, purpose, and intent to delay, hinder, or defraud creditors *and others* of their just and lawful actions, etc., shall be void. 'It extends not only to creditors, but to *all others* who have cause of action or suit, or any penalty or forfeiture;' and, as elsewhere shown, embraces claims for slander, trespass, and other torts. The claimant may not come within a sharply defined meaning of the word 'creditor,' but he may maintain his standing 'in the equity of creditors.' " Wait, Fraud. Conv. (3d ed.) § 110 and cases cited.

We are referred to no authority in conflict with these and asked to support the decision below on the ground that the owner of real estate has the absolute power of disposition and his motive in making the conveyance in question is immaterial. We are unable to do so in the face of this statute and the construction already given it. The legal effect of the voluntary

conveyance to the infant being to hinder and delay the tax-certificate holder in his suit to foreclose the tax certificate, and the complaint demurred to averring that the conveyance was made without consideration and for that purpose and with that intent, it follows that the complaint states a cause of action for the avoidance of the conveyance, and that the demurrer was improperly sustained.

By the Court.—Order reversed, and the cause remanded for further proceedings according to law.

BARNES, J., took no part.

GIBSON, Appellant, vs. MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Respondent.

November 15—December 6, 1910.

Master and servant: Defective materials furnished for servant's use: Duty of inspection: Negligence: Proximate cause: Evidence: Expert testimony: Cross-examination.

1. Where a master buys of reputable dealers material of a standard make (in this case fuse for exploding dynamite) to be used by a servant in the course of an employment which renders it more likely that the servant will seasonably discover defects than that the master could do so by any reasonable inspection, no duty devolves upon the master to inspect such material before turning it over to the servant for use.
2. Where in such a case no inspection which could be required of the master would have been likely to disclose any defect in the material, it cannot be held that the master's failure to inspect was the proximate cause of an injury to the servant resulting from such a defect.
3. Where an inspection would in all probability not have disclosed any defect in the material, and it is wholly a matter of conjecture whether the injury to the servant was or was not the result of any defect, no actionable negligence of the master is shown.

4. A question asked of an expert witness as to the appliances ordinarily used in doing certain work under conditions with which he had had little or no experience, was properly excluded.
5. A question which has for its object the breaking down or weakening of the witness's direct testimony is proper cross-examination.

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action for personal injuries. Plaintiff was a man about forty-four years old who had been accustomed to handle dynamite and do blasting work at different times during a period of about twenty years. In January, 1908, the defendant was engaged in the construction of a line of railroad adjacent to the city of Watertown, and it employed the plaintiff to dynamite upon its right of way in order that the frozen ground might be loosened and graded for its roadbed and track. It appears that plaintiff, on the 2d day of January, in performance of his said service, had loaded six charges of dynamite into as many holes, which were three feet apart, drilled in the ground for that purpose; that he thereupon, by means of a single tape fuse attached to the dynamite stick, caused said dynamite to explode, placing himself at a safe distance of from 300 to 350 feet from the holes containing the dynamite charges; that after waiting about ten or twelve minutes, during which time five of the charges had exploded, he returned to the hole that held the sixth, unexploded charge, and as he stepped within ten or twelve feet of the hole the dynamite exploded and he was seriously injured.

At the close of the plaintiff's evidence, on motion of defendant the court ordered a judgment of nonsuit, from which plaintiff appealed.

For the appellant there was a brief by *Davies, Mulberger & Lueck,* attorneys, and *Aylward, Davies, Olbrich & Hill,* of counsel, and a reply brief by *Aylward, Davies, Olbrich & Hill,* and oral argument by *J. E. Davies.*

For the respondent there was a brief by *Van Dyke, Rose-*

crantz, Shaw & Van Dyke, and oral argument by *Clarke M. Rosecrantz* and *James D. Shaw.*

VINJE, J. 1. The only negligence claimed by plaintiff's counsel upon the oral argument that defendant was guilty of, was in furnishing plaintiff defective fuse. It was contended that it may have been defective either because it was defectively made, so that there was a break in the continuity of the powder train, or because it had become damp and the powder was caked, and that either defect may have caused a delayed explosion. The further claim is made that it was the duty of the defendant to inspect the fuse and discover these defects.

It is conceded by plaintiff that, as to dampness, the fuse was in good condition when it was delivered to the defendant. It appears from the evidence that the fuse was bought from the A. H. Gardner Company of Milwaukee, and that the defendant stored it in a house in which dry sand was kept for the use of its cars. When needed at the different camps it was taken there either on open or closed cars or by wagon. The last order for fuse filled from the storehouse was December 17th, or about two weeks before plaintiff was injured. At about 9 o'clock on the morning of the accident the plaintiff was given two coils of fuse of 100 feet each, which he at once put in a dry box in the shed where the dynamite was kept. It does not appear just where the fuse had been kept previous thereto. The plaintiff says that Finnerty, the foreman, brought it to camp that morning. At about noon plaintiff went back to the dynamite shed, took a coil of fuse, cut off six eighteen-inch lengths, slit open one end about an inch to make a little pocket for the powder to lie in so that it would light more readily, placed the other end inside the cap, and inserted fuse and cap in a hole made in the dynamite, then put the dynamite and fuse into the hole in the ground, tamped earth around them, leaving the end of the fuse with the pocket exposed ready for lighting. In doing this, plaintiff testified

that he observed nothing wrong about the fuse; that the powder was dry; that he did not think the fuse was damp when he got it; that wet spots could not be noticed from the surface; that the only way it could be discovered whether or not it was damp was by cutting, and that then it could be ascertained only from the powder exposed by the cutting.

The evidence fails to disclose any negligence on the part of the defendant in buying, storing, or distributing the fuse. But it is strenuously insisted that defendant was negligent in failing to make a proper inspection thereof before turning it over to the plaintiff. Where a master buys of reputable dealers a standard make of material to be used by a servant in the course of an employment that renders it more likely that he will seasonably discover defects therein than the master by any reasonable inspection he could make, then no duty devolves upon the latter to inspect such material before turning it over to the servant for use. This is on the familiar principle that there is no duty to inspect where the servant is in as good a position to seasonably discover defects as is the master. *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419; *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059. But, conceding that it was the duty of the defendant to make a reasonably vigilant inspection of the fuse, still it is difficult to conceive how an inspection could have been made that would have disclosed any defect therein. It could not have been cut into shorter lengths, for that would have rendered it useless, and wet spots could not have been detected without cutting. There is some evidence tending to show that a defective construction resulting in a break in the powder train may be discovered owing to a slightly diminished diameter. But the testimony is vague and unsatisfactory. The plaintiff in his manipulation of the fuse that morning discovered no such defect. He had used fuse and dynamite for over twenty years, and must, during that time, have acquired unusual skill and aptitude in discovering anything wrong about ma-

terial he used. He discovered nothing after all the handling to which he subjected each piece of fuse. No more severe or minute inspection could be required of the defendant, and no person more skilled than plaintiff to discover defects could it be required to employ. That being so, it follows that no inspection required of the defendant would have been likely to disclose any defect in the fuse, if one did exist, and therefore its failure to inspect could not be the proximate cause of the injury.

It appears from the evidence that, in addition to the causes of defective manufacture and dampness, an improper manipulation of the fuse resulting in a break in the continuity of the powder train, or a faulty insertion of it into the cap, might cause a delayed explosion. We have, then, not only a situation in which an inspection would in all probability not have disclosed a defect in the fuse if one had existed, but also a situation where it is a matter of conjecture as to whether or not the delayed explosion was the result of any defect whatsoever in the fuse. It may have resulted from the acts of the plaintiff himself. No one can make more than a guess as to what its cause was, and several guesses equally plausible may be indulged in. There is no reasonable certainty that any one suggested cause was in fact the cause of the delayed explosion. Its real cause lies wholly in the field of conjecture, and is as likely to be found outside of the sphere of defendant's duty as within it. Hence no actionable negligence can be predicated thereon.

Having arrived at the conclusion that no negligence on the part of the defendant was shown that could be held to be the proximate cause of the injury, the question of plaintiff's alleged contributory negligence and the question as to whether or not sec. 1816, Stats. (1898), applies to defendant's interurban electric railway become immaterial.

2. Plaintiff alleges that the trial court committed error in sustaining an objection to this question asked of the expert witness, Lane: "What kind of tape, single or double, is ordi-

narily used in surface work, blasting rock or frozen ground, in the month of December and latter part of December and January, or in the winter months in this part of the country?" The testimony showed that the witness had very little experience in surface blasting and none in the section of the country referred to by the question. The court therefore properly sustained the objection.

The witness Gardner, who was a member of the company from which the defendant bought the fuse, was called by the plaintiff, and a part of his direct testimony was to the effect that the fuse was in good condition when it was delivered to the defendant. Defendant's counsel upon cross-examination asked him how the fuse was taken from the railway freight depot to his place of business—whether in open or closed wagons. Plaintiff's counsel objected to the question on the ground that it was not proper cross-examination, but the objection was overruled by the court. The evidence sought to be elicited might tend to show that the fuse was not properly handled in its delivery from the railway station to the warehouse of the A. H. Gardner Company, and therefore that it was not in good condition when delivered to the defendant. In other words, defendant's counsel by his cross-examination sought to break down or weaken the effect of the witness's direct testimony. This was manifestly proper, and the ruling was correct.

The other errors relied upon by plaintiff as to exclusion of evidence relate to testimony offered by him to show that he was not guilty of contributory negligence. The exclusion of such evidence becomes immaterial in view of the fact that the question of contributory negligence itself is not material in the case.

By the Court.—Judgment affirmed.

Foss, Appellant, vs. HEINEMAN and another, Respondents.

November 16—December 6, 1910.

Contracts: Breach: Measure of damages: Sales: Agreement for resale.

1. "Where two persons have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."
2. The foregoing applies to all ordinary cases, but there is this common exception, in case of there having been special circumstances, mutually known to both parties at the time of making the contract; then the damages resulting from the breach of such contract, which they would reasonably have contemplated, would be the amount of injury ordinarily flowing from a breach of contract under such special circumstances.
3. The result of the primary rule is, that, in case of a breach of contract to sell and deliver personal property, there being no mutually known special circumstances existing at the time of making the contract, and no special circumstances occurring subsequently to supersede or vary the ordinary rule; the executory vendee is entitled to recover the difference between the purchase price and the fair market value at the agreed place and time for delivery with interest from the time of the breach.
4. The rule of damages aforesaid for all ordinary contracts, no agreement having been made to the contrary, is written into them by operation of law at the time of making; the result waits upon the breach and application of the rule to the then existing conditions.
5. The reason of any rule or measure of damages is that, a person wronged by breach of contract should be as fully as practicable, compensated for his loss; so when the rule applicable to a situation does not reasonably so result, it is superseded or varied by some exception, to effect the policy of the law.
6. If a person agrees to sell and deliver to another at a specified time, price, and place, certain personal property, and such other, thereafter, agrees to resell and deliver at a specified ad-

vanced price, to a third person, all such property received from such person, thereby saving himself from any claim for damages because of being unable to deliver to the second vendee the whole thereof, and such person defaults, such other's recoverable damage for the breach is the difference between his agreed purchase and selling price.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Lincoln county: JAMES O'NEILL, Judge. *Reversed.*

Action to recover $1,694.59 and interest alleged to be a balance due plaintiff for lumber sold by him to defendants.

Defendants answered, among other things, in substance, as follows: Plaintiff sold the lumber to the latter under a contract whereby, for a stipulated price per thousand feet according to specified grades and kinds, he promised to procure, during a specified period, specified kinds of saw logs to the amount of not less than one nor more than three million feet, and manufacture the same into lumber at his sawmill and care for the manufactured product in a specified way and deliver the same, either in the rough or mill worked, on board cars by a specified date. After making said contract defendants bound themselves to resell all the lumber they might obtain under such contract to C. H. Worcester Co. at prices in excess of those of the purchase and to that extent made over their contract to such company, in consideration of being paid such excess price. Thereafter defendants delivered to such company all lumber they obtained under the contract with plaintiff, but in breach thereof he neglected and refused to deliver the agreed minimum amount by 435,841 feet, to their and C. H. Worcester Co.'s damage in the sum of $2,615. Before commencement of the action whatever interest said company had in the claim for damages against plaintiff, was assigned to defendants. Such facts were appropriately pleaded as a counterclaim and judgment demanded for $1,014.65, being the excess over the amount conceded to be due plaintiff upon his cause of action.

The action was tried by a referee who found the facts substantially as alleged in the counterclaim as regards the obligations of the plaintiff and the breach. The amount of lumber which plaintiff failed to deliver, as agreed upon, was fixed at 439,000 feet. The referee further found that, at the date of the contract with plaintiff, defendants, in contemplation thereof, made the resale to C. H. Worcester Co. and that the recoverable damages were, therefore, limited to the profit defendants lost by reason of not being able to deliver the 439,000 feet of lumber to their vendee. On that basis the referee concluded, plaintiff was entitled to recover according to the prayer of the complaint, less $725.94 and interest from the time of the breach.

On proceedings to confirm the report, the only controversy was as to whether the referee assessed the damages according to the proper rule. That was decided in defendants' favor, the court holding that they were entitled to charge the plaintiff with the difference between the price they agreed to pay for the 439,000 feet plaintiff failed to deliver, and the fair market value thereof at the agreed place of delivery and time of the breach, with legal interest, or $3,039.52.

The decision was reached upon the theory that, though when the contract was made between plaintiff and defendants, it was mutually understood that the lumber was bought to be resold, the former did not know to whom such resale would be made nor the terms thereof agreed upon, or to be agreed upon; that there were no special circumstances entering into the transaction; that it was like an ordinary purchase of goods by a middleman to replenish or make up his stock in trade for resale in the regular course of business, and, therefore, that there was no basis for applying any other than the ordinary rule of damages. The findings of the referee were changed accordingly and judgment ordered in defendants' favor for $1,612.17, with costs.

For the appellant there was a brief by *Van Hecke & Fisher*, and oral argument by *W. E. Fisher*.

For the respondents there was a brief by *Smart, Van Doren & Curtis,* and oral argument by *E. M. Smart.*

MARSHALL, J. Did the court apply to the facts the right measure of damages? That is the sole question for solution.

As we view the case the referee reached a conclusion without fully appreciating one feature of the rule in *Hadley v. Baxendale,* 9 Exch. 341, and the court reached a different conclusion without fully appreciating the real basis for such rule, that no rule should be extended beyond the reason for it, and that the very reason often gives rise to an exception when the generality of the situation to which the rule applies is so departed from, in the peculiarities of the particular situation, as to render the way which is ordinarily productive of justice, productive of the opposite.

We shall not discuss at any considerable length the general rule for measuring damages for breach of an executory contract of sale of personal property and the common exception thereto. The formulation of the principle thereof is most notably found in *Hadley v. Baxendale, supra.* As there phrased it has been adopted by this court and courts in general. *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119. The party wronged is entitled to such sum from the wrongdoer as will compensate him for damages arising "according to the usual course of things" from the wrong and such as is "reasonably to be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." In harmony with that principle, which fits all ordinary cases of breach of an executory contract for sale of personal property, it is presumed that, at the inception of an agreement, the parties mutually contemplate that, in case of failure of a vendor to deliver, the vendee will be damnified to the extent of the difference between the contract price and the fair market value of the subject of the transaction at the time and place for such

delivery, and such presumption is so strong that it is a rule of law governing the case, if there is a market price at such place, in the absence of something so out of the ordinary, known to both parties at the time of contracting, that they must be presumed to have agreed with reference thereto.

Extraordinary situations so mutually known and contracted with reference to, are liable to occur, and that gives rise to the necessary supplementary rule that, in any such a case, the parties are presumed to have had, at the inception of their agreement, in mutual contemplation as a result of the breach of it, such damages as may reasonably and fairly be considered as arising according to the usual course of things from such breach under the special circumstances.

The special situation to which the exceptional rule of damages is most generally invoked, was fully discussed in *Guetzkow Bros. Co. v. A. H. Andrews & Co., supra,* i. e. it is where a person after having contracted to sell an article not commonly readily obtainable in the market, to another, contracts with a third person, who knows of such executory sale, for such article at a less price. The ordinary rule is generally supposed to fix the minimum of damages and the exceptional rule to enable the injured party to recover such additional amount as will fully compensate him for the injuries which fall within the scope of mutual contemplation at the inception of the agreement as probable results of a breach of it, in view of special circumstances then mutually known. Whether it may be invoked by the wrongdoer to reduce his liability below what it would be in an ordinary case, as well as by the wronged party for the opposite effect, is not necessary to here decide, as we view the case. The referee evidently thought to the contrary and decided accordingly, upon the theory that defendants sold the lumber before they purchased the same, or had done so substantially, and that the contract with appellant was for the purpose of carrying out a substantially already agreed upon trade with another party. The facts seem to be otherwise.

As the trial court found, it satisfactorily appears that respondents contracted with appellant for lumber for the purpose of obtaining stock to sell in the regular course of business; not for the purpose of supplying lumber to a customer upon an existing executory contract of sale. There were no extraordinary circumstances existent at the inception of the contract, either mutually known to the parties or otherwise. The mere fact that it was mutually understood that the lumber was bought to be resold in the regular course of respondents' trade, did not create a special situation any more, as the trial court held, than does any common occurrence of a purchase by a middleman, who buys to sell in merchandising operations.

From the foregoing it is clear that the rule of damages which became a part of the contract, usable under all ordinary circumstances in case of the breach of it, was the ordinary one above indicated, and the one which the trial court applied to the case. Did the logic of the situation justify such application? That is the question.

It must be remembered that the law of a contract in respect to the rule of damages, governing in case of the breach of it, till superseded by some exceptional circumstance thereafter happening, is definitely fixed and becomes a part of the agreement when made. We are now speaking of the rule or measure of damages, not what such rule or measure will produce. That waits upon the breach and application of the rule to the conditions then found, but the rule itself is agreed upon in the nature of an impersonal arbiter, at the time of and in the contract itself. All the authorities are to the effect that the damages are such, and only such, as are referable to the situation from the standpoint of mutual knowledge when the minds of the parties finally met contractually. That has been emphasized, time and again, in the adjudications of this and other courts, and it is the very vital principle of the rule in *Hadley v. Baxendale, supra; Guetzkow Bros. Co. v. A. H. Andrews & Co., supra; Serfling v. Andrews,* 106 Wis. 78, 81,

81 N. W. 991; *Seeman v. Biemann,* 108 Wis. 365, 375, 84 N. W. 490; *Malueg v. Hatten L. Co.* 140 Wis. 381, 385, 122 N. W. 1057; *Loehr v. Dickson,* 141 Wis. 332, 337, 124 N. W. 293; *Lincoln v. Chas. Alshuler Mfg. Co.* 142 Wis. 475, 480, 125 N. W. 908.

In the foregoing and many other cases that might be referred to, this court has said, in terms or effect, the rule of damages is written into the contract when made, the result in case of a breach is dependable upon applying that rule to the situation as it exists at the time of the breach. Therefore, as indicated, in case of a breach of an executory contract of sale of personal property, there being no special circumstances rendering more than ordinary damages presumably within the contemplation of the parties at the time of making the contract as likely to occur from the breach of it, the limit of legal damages is the difference between the market value of the property at the time and place of delivery, if there is such market value, otherwise the market value at a point as near thereto as practicable, and the price the executory purchaser agreed to pay therefor with legal interest from the date of the breach.

Underlying the foregoing rule is the basic reason thereof, that he, who by his fault in respect to performing contractual obligations causes injury to the one contracted with, should, in justice, make that one whole as regards the result of such fault, so far as in legal contemplation he must be held to have anticipated such result when he contracted, as a probable consequence of such fault. The idea, it will be seen, which vitalizes and limits the whole system of recoverable damages for breach of contract, is to measure out justice upon a common-sense basis; to compel the wrongdoer to respond within the written or unwritten calls of the agreement with an equivalent for the loss inflicted. Compensation for loss, not penalizing for the fault to the enrichment of the person wronged, is the right of the matter in contemplation of law. The law does not concern itself with either profit or loss to the person

committing the fault, though, doubtless, reparation for the loss, on principle, should not be minimized to fit the real loss to the person injured, for the enrichment of the wrongdoer.

From the foregoing it would seem that whenever a situation is created subsequent to the making of a contract, either by mutual acts of the parties, or by the act of either, so that a breach by the executory vendor, under the rule incorporated into the contract, would yield a profit to the executory vendee, the reason for such rule is thereby superseded; suspended as to the particular case, calling for an exceptional rule in harmony with such reason. In other words, as to a peculiar situation to which the dominant thing and the rule springing therefrom apply for all ordinary cases cannot be applied with the result such dominant thing calls for, from the standpoint of mutual justice; that is to put the person suffering from the breach in the same position he would have been but therefor, the latter should prevail regardless of whether the history of decided cases furnishes any precise precedent to fit the particular situation or not. That is the real spirit of *Hadley v. Baxendale,* 9 Exch. 341, as elucidated in *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119, and enlarged upon as an elementary principle in 1 Sutherland on Damages (3d ed.) § 12, relied upon by the referee in reaching his conclusion.

The following, supported by authority, was promulgated by the elementary writer and challenged the attention of the learned referee:

"The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception."

In connection with that the writer paid heed to the existence of arbitrary rules "which have been adopted from con-

siderations of policy, ostensibly on the basis of compensation, which really fall short of that object in a conservative deference to possible consequences to the party who must respond to the demand," because there are possible damages; often not determinable by any definite standard and not reasonably within the contemplation of contracting parties at the time of contracting as probable results of a breach. But no such deference is ordinarily indulged in to the manifest enrichment of one party, nor deference to the other to his manifest enrichment beyond the ordinary fruits of his contract under all the circumstances.

Here we have the situation to which the logic of what has been said seems to apply. The respondents, subsequently to their contract of purchase, resold at a certain advance on their purchase price, not all the subject of purchase, but all thereof which they might obtain by performance by their executory vendor. Thereby they liquidated the possible amount of their probable damages by failure of such vendor to fully perform. Whether,—had such vendor breached his contract for the purpose of taking advantage of the advance in market price of the lumber over the selling price to respondents' executory vendee; characterizing the breach by a species of fraud,—he could profit by the terms of the resale contract, which fixed the actual loss of his vendee at much less than would have been the result in an ordinary case,—we have not before us; though that he should not would seem to be in harmony with the legal principle of justice suggesting the legitimate basis of administration. The facts seem to be that there was no such moral unfairness in this case. The appellant did not reserve a part of the stock he agreed to turn over for the purpose of reaping an advantage thereby. He furnished all he accumulated for the purpose of carrying out his contract, and used reasonable diligence in respect to the matter, so far as there is any evidence in the record. Under those circumstances should he suffer loss by being required to pay respond-

ents a greater amount than the profit the contract with him would have yielded under the special circumstances, had it been fully performed? Since, as the referee suggested, respondents incapacitated themselves from selling the lumber at the market price, and at the same time protected themselves from loss by appellant's failure to perform, in excess of the difference between their purchase and selling price, can they, nevertheless, have the benefit of the difference between the former price and the market value at the time of the breach and agreed place of delivery? Can their foresight in insuring themselves against loss in excess of a fixed amount in case of the market price going down and appellant defaulting, still leave them in a position to mulct the latter just the same, upon the theory that he would otherwise gain by such insurance, which he had no hand in effecting? On principles applicable to contractual matters, it is considered that these questions must be answered in favor of appellant.

From the foregoing we deduce the following auxiliary to the ordinary rule and the common exception made conspicuous in *Hadley v. Baxendale, supra,* and adopted as indicated, by this and other courts: Where an executory vendee, subsequent to making his agreement of purchase, contracts to resell the subject of the transaction at an advanced price, protecting himself against possible loss in case of his being prevented from performance by default of his vendor, by agreeing to deliver to the second vendee only such part of such subject as comes to him from such vendor, and the latter without bad faith fails to perform, the measure of damages of such executory vendee cannot exceed the difference between his agreed purchase and selling price.

Thus we reach the same result as did the referee but on a somewhat different line of reasoning though upon substantially the same principles. The reasoning is different, in that the circumstance supposed by the referee to exist,—that respondents made their contract to sell before they made the con-

tract to purchase, though that situation was not known to appellant when such contract to purchase was made,—did not exist in fact, does not cut any figure in the matter; and, further, the circumstance that the lumber was, to the knowledge of appellant, at the time of such contract of purchase, designed for resale, does not count in the result. The situation as to the facts is found precisely as the learned circuit judge found them to be, but the ordinary rule and common exception to fit special circumstances, are subject to supersession by an auxiliary rule to fit situations to which such ordinary one and common exception, cannot be applied without violating their own basic reason.

By the Court.—The judgment is reversed, and cause remanded with directions to enter judgment in accordance with the conclusion of the referee, with costs.

ANTIGO WATER COMPANY, Appellant, vs. CITY OF ANTIGO, Respondent.

November 16—December 6, 1910.

Municipal corporations: Franchise ordinance: Validity: Contract: Member of council interested: Stockholder of corporation: Estoppel: Ordinance construed: Waterworks: Tests of efficiency: Liability for hydrant rentals: Conditions precedent: Burden of proof.

1. The contract provisions relating to the furnishing of water for city purposes and the payment of hydrant rentals by the city, contained in a franchise granted to a water company, are within the contemplation of a charter provision prohibiting any member of the common council from being a party to or interested in any job or contract with the city and declaring that any contract in which such member may be so interested shall be null and void.
2. The fact that a member of the common council is a stockholder in a corporation to which such a franchise is granted makes

him interested in a contract with the city within the meaning of the said charter provision, and renders null and void the entire ordinance embodying the terms of the franchise and contract.

3. Where a waterworks franchise was granted to a private individual and assigned by him to a corporation and, after the construction of the plant and its failure to meet the test prescribed in the franchise, a new ordinance was passed purporting to be an amendment to the previous one, providing for payment of hydrant rentals, and omitting a condition of the original ordinance relieving the city from the obligation for such rentals if the plant failed to meet the requirements of subsequent tests called for by the city, and at the time of the adoption of such amending ordinance a member of the council was a stockholder in the corporation, this fact rendered the latter ordinance void and left the former in full force.

4. In such case the city was not estopped from asserting the invalidity of the amending ordinance because it insisted on the agreements embodied therein before it would accept the waterworks plant, or because for over seventeen years it accepted and paid for the public services therein provided for, or because it always claimed to act under it in all matters pertaining to the maintenance and extension of the system and thereby induced the water company to maintain and operate its plant pursuant thereto, since (1) most of the acts relied on to work an estoppel were equally referable to the original ordinance, and the additional service required was slight, and (2) because the water company, equally with the city, must be presumed to know the law and hence to know that such amending ordinance was void.

5. Where a waterworks franchise authorized the city from time to time to demand tests of the efficiency of the plant, and provided that if the test could not be satisfactorily made owing to a deficiency in the system the city should be free from obligation to pay hydrant rentals after ten days until such time as a test could be successfully made, the water company was bound, as a condition precedent to its right to recover rentals accruing later than ten days after an unsuccessful test, to show that the rentals were earned by the system complying with the requirements as to efficiency, even though it continued to furnish and the city to use water for public purposes; and no question of forfeiture of rentals earned is involved in such a case.

6. In the absence of any agreement to the contrary it must be held that the franchise provision contemplated that the tests should

be made under ordinary operating conditions of the plant; and, there being nothing in the evidence to show that the operating conditions were not the usual ones, the water company could not excuse failure by a claim that there must have been an unusual discharge through the service connections which it could not reasonably have anticipated.

7. Where plaintiff set up a claim for hydrant rentals under the contract provisions of the ordinance, and defendant denied liability, alleging that the services were not rendered as provided in the contract, the burden of proof was on the plaintiff throughout the trial to establish its claim by preponderance of the evidence, and defendant was not bound to show wherein the system was deficient in order to relieve itself from liability.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

By ordinance No. 30½, approved June 12, 1890, the common council of the city of *Antigo* granted W. G. Maxcy the right and privilege of erecting, maintaining, and operating a system of waterworks in the city of *Antigo* for a period of thirty years. This right and privilege was duly accepted and assigned to the plaintiff.

The ordinance prescribed requirements as to buildings, the plant and machinery, mains and pipes, and the establishment and changing of the grades of streets. It contained provisions regarding waste and pollution of the water and its sources; fixed the maximum rates for water furnished to private consumers; made provision for the purchase of the plant by the city; and provided that the plant should be completed on or before the 15th day of January, 1891. The ordinance contained the following provisions regarding the hydrants of the system and their use by the city. Sec. 5 reads as follows:

"Upon the completion of said works they [the waterworks] shall be tested as to their power and capacity. When said works shall throw water, with the aid of their pumping machinery, from any six separate hydrants located in the business part of the city at one and the same time, one stream from each hydrant through 100 feet of 2½ inch rubber hose and a one-inch ring nozzle, to a height of one hundred (100) feet

perpendicularly for a period of five hours in still air, half of said hydrants to be selected by the city and half by the grantee, and if successful the rental for the fire service herein stipulated shall begin and the said city agrees to furnish said grantee, or his assigns, upon said test, a certificate in duplicate to that effect. The city shall have the right to require a similar test once a year during the continuance of his franchise."

The ordinance provides for the rental of a definite number of hydrants by the city and for additional hydrants on extensions; provides that the water company shall furnish free water for public buildings and for flushing sewers; regulates the use of hydrants; and provides for raising funds and for the payment of the hydrant rental. Sec. 12 provides:

"In case a test as prescribed in sec. 6 [sec. 5] should at any time be demanded by the city council and it should be found that such test cannot be satisfactorily made owing to a deficiency in said system, then the city of *Antigo* shall be free from obligation to pay the hydrant rental from ten days after date of such trial to such time as a test can be successfully made as above."

Other sections of the ordinance provide for the acceptance of the ordinance, that the acceptance shall constitute a contract binding between the parties, and that the water company shall file a bond for the performance of the conditions of the ordinance. The other provisions of the ordinance are not involved in this case.

The plant was not completed at the time provided in the ordinance, but on February 1, 1891, a test was made and the company demanded acceptance by the city. Meanwhile one H. E. Humphrey, a member of the common council, had become interested in the water company as a shareholder. The city did not accept the plant, and negotiations were had between the city and the company looking to changes in the original ordinance No. 30½. These changes were embodied in a proposed ordinance, amending ordinance No. 30½ and

known as ordinance No. 44, which was adopted by the council on March 12, 1891. The record of the vote by the council adopting this ordinance is: "Moved and seconded that ordinance 30½ as amended be adopted. Motion carried." The vote on the adoption of this ordinance was not "entered by ayes and nays upon the journal of the common council" under the provisions of sec. 3, subch. IX, of the city charter (ch. 173, Laws of 1887), which provides:

"No debt shall be contracted against the city . . . unless the same shall be authorized by a majority of all the members elect of the common council, and the vote authorizing the same shall be entered by ayes and nays upon the journal of the common council."

Sec. 10, subch. XIV, of the charter of the city also provides:

"No member of the common council shall be a party to, or interested in any job or contract with the city, or any department thereof; and any contract in which any such member may be so interested, shall be null and void."

Mr. Humphrey was a member of the common council at the time ordinance No. 44 was adopted and was also at that time a stockholder in the water company.

Among others ordinance No. 44 amended the provisions of ordinance No. 30½ in the following particulars: The city could use open butts on the hose instead of nozzles in flushing sewers; the rental for hydrants was to be payable at the office of the city treasurer; the city was relieved of the duty of inspecting hydrants and this duty was imposed on the company; and the provisions of sec. 12 of the original ordinance, providing that the city should be free from any obligation to pay hydrant rental from ten days after the system was found not to comply as to power and capacity with the required test to such time as such test could be successfully made, was omitted from the ordinance as amended.

After the passage of ordinance No. 44 the city issued a

certificate showing the satisfactory character of the test and acceptance of the waterworks. The receipt of this certificate was acknowledged by the water company through Mr. Humphrey as one of its officers.

The water company has furnished free water as provided in the amending ordinance and as required in the original ordinance No. 30½; made extensions as required by the common council; furnished pressure for service in case of fire alarms; and allowed the city to have the use of the hydrants. The city duly paid hydrant rental until July 1, 1908.

June 27, 1908, pursuant to a resolution demanding a test, adopted June 2, 1908, by the common council, a test was made of the capacity of the waterworks plant. The streams of water were not thrown to the height prescribed by the ordinance for the test, and the test was discontinued before five hours elapsed because of an insufficient supply of water. Upon the bill for hydrant rental for the period from July 1, 1908, to January 1, 1909, being presented to the city, a resolution was adopted by the common council on February 16, 1909, disallowing the claim on the ground that because of the failure of the test to meet the requirements of sec. 5 of ordinance No. 30½ the city was not liable to the water company for hydrant rental until there should be a satisfactory test of the plant, and because no such test had been made during the period covered by the claim after the failure of June 27, 1908.

After the test of June 27, 1908, the city continued to use the hydrants in case of fire, water was taken from them for flushing sewers, the city public buildings were furnished with free water, extensions were made of the water plant on the demand of the council, and no change was made in the use of water by the city from the use in the operation of the waterworks plant as it had existed previously. The council took no official action respecting the unsatisfactory results of the test except to disallow the claim for hydrant rental, as above stated.

This is an action to recover such rentals for hydrants, alleged to be due for the term from July 1, 1908, to January 1, 1909. The city answered denying the obligation and presented a counterclaim for taxes alleged to be due, for which the city had obtained judgment against the water company.

The jury returned a verdict finding that the test made on June 27, 1908, did not meet the requirements of sec. 5 of ordinance No. 30½, and judgment was entered allowing rental for seven days in July, 1908, ordering that the judgment obtained by the city for unpaid taxes should be reduced by the amount allowed as rental for these seven days, and that the plaintiff recover nothing.

This is an appeal from the judgment.

For the appellant there was a brief by *Smart, Van Doren & Curtis,* and oral argument by *E. M. Smart.* They cited on the point of ratification, *Milford v. Milford W. Co.* 124 Pa. St. 610, 17 Atl. 185; *Trainer v. Wolfe,* 25 Pa. St. 279, 21 Atl. 391; *Marshall v. Ellwood,* 189 Pa. St. 348, 41 Atl. 994; *Ft. Wayne v. L. S. & M. S. R. Co.* 132 Ind. 558, 32 N. E. 215; *Findlay v. Pertz,* 66 Fed. 427; *Ashland v. Wheeler,* 88 Wis. 607; *Washburn W. W. Co. v. Washburn,* 129 Wis. 73. They also contended, *inter alia,* that waterworks contracts were not within the purview of the charter prohibition. *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76; *Hurley W. Co. v. Vaughn,* 115 Wis. 470; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk,* 96 Wis. 73. The case was a proper one for the application of the doctrine of practical construction. *Hurley W. Co. v. Vaughn,* 115 Wis. 470; *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367; *Port Huron v. McCall,* 46 Mich. 565. The city was estopped from asserting the invalidity of the amending ordinance. *Ashland v. N. P. R. Co.* 119 Wis. 204; *Ashland v. C. & N. W. R. Co.* 105 Wis. 398; *Chicago, St. P., M. & O. R. Co. v. Douglas Co.* 134 Wis. 197; *Paine L. Co. v. Oshkosh,* 89 Wis. 449; and many other cases.

The provisions of the original ordinance should be construed as a penalty or forfeiture and not as a condition precedent; the city had estopped itself from claiming such forfeiture, or at least had waived it; and having continued to enjoy the service, it should pay for it. *Chicago H. W. Co. v. U. S.* 106 Fed. 385, 53 L. R. A. 122; *Madison v. Am. S. E. Co.* 118 Wis. 480; *Eureka L. & I. Co. v. Eureka,* 5 Kan. App. 669, 48 Pac. 935; *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496; *Att'y Gen. v. S. & St. C. R. Co.* 93 Wis. 604; *Gates v. Parmly,* 93 Wis. 294; *Kerslake v. McInnis,* 113 Wis. 659; *Wheeling & E. G. R. Co. v. Triadelphia,* 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. N. S. 321; *Wiley v. Athol,* 150 Mass. 426, 23 N. E. 316, 6 L. R. A. 342; *Joplin W. Co. v. Joplin,* 177 Mo. 496, 76 S. W. 960; *Sykes v. St. Cloud,* 60 Minn. 442, 62 N. W. 613; and other authorities.

For the respondent there was a brief by *Morson & McMahon,* attorneys, and *Kreutzer, Bird, Rosenberry & Okoneski,* of counsel, and oral argument by *S. J. McMahon* and *C. B. Bird.* To the point that a stockholder in a corporation is interested in its contracts with the city, they cited, among other authorities, *Brown v. School Dist.* 70 N. J. Law, 762, 58 Atl. 115; *Drake v. Elizabeth,* 69 N. J. Law, 190, 54 Atl. 248; *Milford v. Milford W. Co.* 124 Pa. St. 610, 3 L. R. A. 122; *Grand Island G. Co. v. West,* 28 Neb. 852, 45 N. W. 242; *Hardy v. Gainesville,* 121 Ga. 327, 48 S. E. 921; and to the point that there could be no ratification or estoppel in respect to a void ordinance, they cited numerous cases, among them *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245; *Quayle v. Bayfield Co.* 114 Wis. 108; *Agawam Nat. Bank v. South Hadley,* 128 Mass. 503; *Berka v. Woodward,* 125 Cal. 119, 45 L. R. A. 420; *Caxton Co. v. School Dist.* 120 Wis. 374; *Dullanty v. Vaughn,* 77 Wis. 38; *Smith v. Newburgh,* 77 N. Y. 130; *Cascaden v. Waterloo,* 106 Iowa, 673, 77 N. W. 333; *Gutta Percha & R. M. Co. v. Ogalalla,* 40 Neb. 775, 59 N. W. 513; *Topeka W. S. Co. v. Root,* 56 Kan. 187, 65 Pac. 233; *Cawker*

v. Milwaukee, 133 Wis. 35; *Reuter v. Lawe,* 94 Wis. 300, 305; *Bogie v. Waupun,* 75 Wis. 1, 7; *Thomas v. Railroad Co.* 101 U. S. 71, 86; *Le Feber v. West Allis,* 119 Wis. 608; *Allen v. Clausen,* 114 Wis. 244; *Arnott v. Spokane,* 6 Wash. 442, 33 Pac. 1063. They also argued, among other things, that there was no evidence upon which to base any waiver or estoppel as to the city; that the contract was entire, as to each period at least; and that performance was a condition precedent to recovery. *Widman v. Gay,* 104 Wis. 277; *Tilton v. J. L. Gates L. Co.* 140 Wis. 197, 205; *National K. Co. v. Bouton & G. Co.* 141 Wis. 63; *Williams v. Thrall,* 101 Wis. 337; *Manthey v. Stock,* 133 Wis. 107, 110; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327; *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1; and other cases. There was no voluntary acceptance of service such as would render the city liable. *Genni v. Hahn,* 82 Wis. 90, 92; *Manitowoc S. B. Works v. Manitowoc G. Co., supra.*

SIEBECKER, J. The first question raised presents the inquiry: Is ordinance No. 44 void because Mr. Humphrey was a stockholder of the *Antigo Water Company* and a member of the common council of the city of *Antigo* at the time this ordinance was adopted? The city charter of *Antigo* (subch. XIV, ch. 173, Laws of 1887) provides:

"Sec. 10. No member of the common council shall be a party to, or interested in any job or contract with the city, or any department thereof; and any contract in which such member may be so interested, shall be null and void."

It is undisputed that Mr. Humphrey was a stockholder of the water company, one of its directors and its president, and a member of the common council on March 12, 1891, the date of the adoption of ordinance No. 44. It also appears that the water company was then in default under the original ordinance No. 30½, providing for the construction of the water-

works, in that the plaintiff had failed to erect a completed plant within the time prescribed. The city was adverse to accepting the waterworks plant under these circumstances unless the plaintiff would agree to amendments to the original ordinance in the respects above set forth, which amendments are embodied in ordinance No. 44. It is to be noted that ordinance No. 44 embodies the terms and conditions constituting the agreements between the parties respecting the furnishing of water for city purposes and the compensation plaintiff was to receive therefor. It therefore contains the contract obligations of the city, imposed and assumed through the adoption of this ordinance by the common council, for it was therein provided that the city was to pay the plaintiff hydrant rentals upon the terms and at the cost therein specified. These contract obligations are manifestly such as are within the contemplation of the above quoted sec. 10, subch. XIV, of the city charter, which makes a contract null and void if any member of the common council be interested in it at the time of its adoption.

It is an admitted fact that Mr. Humphrey, at the time of the adoption of this ordinance, owned a substantial amount of the stock of the water company. Does this fact make him interested in the contract with the city within the contemplation of the foregoing charter provision? This provision was undoubtedly intended to embrace in its application to the government of the city, through its authorized agents and the members of its governing body, the general and well recognized principle of law that no man can faithfully serve two masters whose interests are in conflict. The law forbidding such persons from contracting with the municipality rests upon grounds of public policy. It is designed to prevent fraud and wrong dealing with public affairs and hence it prohibits such trustees from contracting with themselves. Such prohibitions have been held to embrace contracts by corpora-

tions where it appeared that the municipal officers and agents owned stock of such corporations. As stated in *Hardy v. Gainesville,* 121 Ga. 327, 48 S. E. 921:

"A stockholder in a private corporation clearly has an interest in its contracts; and if the city cannot make the contract with the officer himself, it cannot make it with a corporation in which such officer is a stockholder."

Authorities to the same effect are: *San Diego v. S. D. & L. A. R. Co.* 44 Cal. 106; *Dwight v. Palmer,* 74 Ill. 295; *Goodrich v. Waterville,* 88 Me. 39, 33 Atl. 659; *Santa Ana W. Co. v. San Buenaventura,* 65 Fed. 323.

The charter provision declares such contracts wholly null and void. We are persuaded that ordinance No. 44 never had any validity because Mr. Humphrey was a member of the council when it was adopted and was interested in the contract by reason of being a stockholder of the plaintiff company.

Since, then, such contract was absolutely void, is the city estopped from asserting its invalidity after receiving and accepting the public service for the city as therein provided for over seventeen years? The appellant strenuously contends that the city is estopped from denying its validity under the circumstances shown, because it insisted on the agreements embodied in ordinance No. 44 before accepting the waterworks theretofore constructed as required by the original ordinance, and because it has accepted and paid for the public service provided in the amending ordinance throughout all these years, has claimed to act under such ordinance in all matters pertaining to the maintenance and extension of the system and the furnishing of water for the city and its inhabitants, and that it thereby induced the plaintiff to maintain and operate its plant pursuant thereto and to furnish the city the service thereby required. Two important facts must be kept in the foreground in considering whether an estoppel has been shown. First, that most of the acts of the city upon

which appellant relies to work an estoppel were acts required of it under the conditions of ordinance No. 30½, which for the purposes of this case is deemed to be valid; and, secondly, that appellant must be presumed to know the law as well as the city, and that the law made ordinance No. 44 null and void on account of Mr. Humphrey's interest in the contract. Under such circumstances the observations of the court in *Swan v. Scott,* 11 Serg. & R. 155, are illuminating and of force:

"The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case. If a plaintiff cannot open his case, without showing that he has broken the law, a court will not assist him, whatever his claim in justice may be upon the defendant."

Since, then, the law implies that plaintiff's officers and agents had knowledge of the invalidity of ordinance No. 44, these considerations are applicable here, and plaintiff cannot under the circumstances be heard to say that it acted in perfectly good faith in erecting and maintaining the waterworks and in relying on the conduct of the city in affirmance of the validity of the ordinance when it was supplied with water for public purposes. Then again, the additional service provided under this ordinance to that required by the original ordinance No. 30½, under which the parties must be held to have proceeded, embraces only a small part of the service rendered for the city and hence is of slight operative weight in establishing an estoppel. In the light of these circumstances, the facts shown, in our opinion, do not estop the city from asserting the invalidity of ordinance No. 44, and the plaintiff's rights in its dealings with the city must rest on the terms and conditions of the original ordinance No. 30½, adopted June 12, 1890. *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101; *Ashland v. N. P. R. Co.* 119 Wis. 204, 96 N. W.

688; *Appleton W. Co. v. Appleton,* 132 Wis. 563, 113 N. W. 44; *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240.

It is further averred that, since the plaintiff has furnished water service for city hydrants, the compensation provided therefor has been earned and the city is obligated to pay it. The ordinance provides (sec. 12) that:

"In case a test as prescribed in sec. 6 [sec. 5] should at any time be demanded by the city council and it should be found that such test cannot be satisfactorily made owing to a deficiency in said system, then the city of *Antigo* shall be free from obligation to pay the hydrant rental from ten days after date of such trial to such time as a test can be successfully made as above."

We find no such uncertainties and ambiguities in the language and meaning of these words as are suggested in appellant's behalf. The context and words clearly indicate that whenever the city demands that the waterworks system be tested, and it is found that owing to a deficiency in the system such test cannot be satisfactorily made as prescribed by sec. 5, then the city is "free from obligation to pay hydrant rental from ten days" thereafter. The context of this provision is plain and clearly expresses the obvious intention of the parties, to the effect that from ten days after subjecting the system to such a test showing a deficiency in the system to meet the calls of the test agreed upon, then the city is freed from the obligation of paying hydrant rental. The legal effect of this condition respecting the sufficiency of the system imposed on plaintiff the duty of furnishing a plant to meet the requirements of this test in order to entitle it to charge the specified hydrant rental. Hence, if it failed in performing the contract in this respect, no rental was earned by it. It therefore devolved on the plaintiff to show that the system complied with the test to entitle it to recover. This being the contractual relation between the parties, no question of forfeiture of hydrant rentals earned by the plaintiff and due

from the city can arise in this action. Performance by the plaintiff is therefore a condition precedent to its right to recover the rent demanded. *Kaukauna E. L. Co. v. Kaukauna*, 114 Wis. 327, 89 N. W. 542.

It is, however, asserted that the record does not sustain the finding of the jury to the effect that plaintiff's waterworks system was not sufficient on June 27, 1908, to comply with the test required under the ordinance. The trial court, in passing on the sufficiency of the evidence adduced, held that the evidence was sufficient to sustain the jury's findings upon the issues submitted to them. A reading of the evidence in the case leads us to the same conclusion. It is too voluminous to justify a statement of the material parts and a discussion thereof at this time. The *quantum* of proof submitted on the ultimate facts found by the jury abundantly sustains the verdict in all of its phases and hence it must stand as found by the jury. The verdict embraces the issues of fact and is properly framed to call for their determination by the jury.

The objection to the effect that the questions submitted were indefinite and uncertain is not well taken. The form and context of the questions are plain, direct, and clearly cover the disputed questions of fact at issue.

The claim that there must have been an unusual discharge of water through the service connections during the progress of the test on June 27, 1908, which plaintiff could not reasonably have anticipated, and hence that this test is not binding on it, is not well founded. The agreements of the parties contemplated that the test should be made under the ordinary operating conditions of the plant, and there is nothing to indicate that the operating conditions were not the usual ones under the pressure required to make the test.

Nor is the claim that an accidental disability in the gallery was the cause of the failure of the test sustained, for it appeared that this condition had nothing to do with the water supply during the first several hours of the test, when, as

shown by the evidence, the system did not furnish a pressure so as to comply with the prescribed test. That the water supply is an essential factor in providing and maintaining a sufficient plant is self-evident from the nature of plaintiff's undertaking to furnish a sufficient waterworks system. Unless plaintiff provided the necessary supply of water to fulfil the contractual obligations imposed by the ordinance, it cannot be said to have performed its part in furnishing the system provided for, and default in this respect is an omission on its part to perform the contract.

It is contended that the court erred in refusing to instruct the jury, as requested, respecting the burden of proof as to the issues submitted to the jury, and in the instructions given. These objections all go to the point as to whether or not the burden of proof rested on the plaintiff to show that the system as maintained and operated complied with the conditions of the contract and as to whether or not the rentals sued for were earned while the system had the efficiency required by the terms of the ordinance. The issues involved in the case must be looked into to ascertain on whom the burden of proof in respect thereto rested. The plaintiff alleges a claim for rent due for services rendered under the contract provisions of the ordinance. The defendant denies liability, alleging that the service was not rendered as provided in the contract, and therefore that nothing ever became due therefor under the contract. The situation thus presented casts the burden of proof on plaintiff of establishing its claim throughout the trial by a preponderance of the evidence. The argument that this rule does not apply because it devolved on the defendant to show under the contract provisions wherein the system was insufficient in order to be relieved from its obligations to pay hydrant rentals, rests upon an erroneous view of the terms of the agreement. As above indicated, the general rule as to liability under contracts applies here, namely, that one party to a contract cannot demand recovery on an agreement until he

shows performance thereof on his part. And so here, the plaintiff must show performance of its undertaking in order to establish a right to recover these rentals. This required it to show that the service for which payment is sought to be enforced was furnished by a waterworks system which had the efficiency required by the ordinance. The evidence shows that such was not the case for the period covered by the claims herein in litigation. The trial court properly instructed the jury respecting the burden of proof in the case.

We find no prejudicial error in the record. The issues were fully and correctly submitted to the jury and the court awarded the proper judgment in the case.

By the Court.—Judgment affirmed.

MARSHALL, J., dissents.

BARNES, J., took no part.

DICKSON, Administrator, Respondent, vs. BILLS, Appellant.

November 16—December 6, 1910.

Gifts causa mortis: *Delivery: Witnesses: Examination as adverse: Privileged communications: Appeal: New trial: Newly discovered evidence.*

1. Where a gift *causa mortis* was intended, but the delivery as well as the gift was intended to be conditional on the donor's death, and there was no actual delivery, the donee acquired no title as against the administrators of the donor.
2. Delivery by the donor to the donee of the keys of a deposit box, together with a writing directing the deposit company to "give over" the contents of such box to the donee, did not, under the circumstances of this case, constitute a constructive delivery equivalent to an actual delivery of the contents of the box, there being evidence and a finding of the trial court to the effect that the donor did not intend a delivery before her death. *Crook v. First Nat. Bank*, 83 Wis. 31, distinguished.

3. Refusal to allow a witness to be examined as an adverse witness under sec. 4068, Stats. (1898), cannot be held prejudicial error unless exception was taken and the examination was proceeded with so as to show prejudice from the ruling.
4. There being considerable evidence to support the trial court's decision of a preliminary question of fact upon which it based a ruling that a communication to an attorney was privileged, such decision will not be disturbed on appeal.
5. Refusal to grant a new trial on the ground of newly discovered evidence was not error where such evidence was cumulative or corroborative of evidence given on the trial and was much weakened by contradictory statements or admissions alleged to have been made by the proposed witnesses and otherwise.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *F. H. Griggs* and *W. H. & T. F. Frawley,* and oral argument by *T. F. Frawley.* They cited, among other cases, *Wilson v. Carpenter,* 17 Wis. 512; *Harrigan v. Gilchrist,* 121 Wis. 127, 314, 99 N. W. 909; *Henschel v. Maurer,* 69 Wis. 576, 34 N. W. 926; *Brenger v. Brenger,* 142 Wis. 26, 125 N. W. 109.

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.* Among other cases cited in their brief were *Schultz v. Becker,* 131 Wis. 235, 110 N. W. 214; *Tyler v. Stitt,* 127 Wis. 379, 106 N. W. 114; *More v. May,* 117 Wis. 192, 94 N. W. 45; *Jackman v. Eau Claire Nat. Bank,* 125 Wis. 465, 104 N. W. 98; *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; *Milwaukee S. & R. Co. v. Lindenberger,* 142 Wis. 273, 124 N. W. 272; *Meyer v. Doherty,* 133 Wis. 398, 113 N. W. 671.

TIMLIN, J. This is a suit by the administrator of Lelia I. Russell, deceased, to recover from the defendant certain property which the latter claims as a gift from deceased. The administrator recovered, and it is contended that the findings of the circuit court are not supported by evidence.

Lelia I. Russell was a married woman living apart from her husband and owned certain furniture in a house in St. Paul, Minnesota, occupied by her under a lease, and also owned some money, bonds, and jewelry which were in a safety deposit box in the same city, also held by her under a lease. The defendant is her brother, who lived at Augusta, Wisconsin, and who had been during a part of her sickness visiting deceased and attending to some of her affairs. While sick and apprehensive of death she had some of her furniture collected from the several rooms in her house and placed or stored in one room, and she informed the defendant that she would give or did give him this furniture so stored. No further delivery was made prior to her death. She also on May 29, 1906, called by telephone one of the officers of the safety deposit company and stated that she had only a short time to live and wished to know how she could get or have delivered the contents of her safety deposit box. At the dictation of this officer over the telephone she executed on that day an instrument in words and figures following: "May 29, 1906. Minneapolis Loan & Trust Co. Safe Deposit Vault: Please give over contents of strong box No. 2419, password Pem, to my brother, *George Bills,* Augusta, Wis. This is my authority. Lelia I. Russell." On this day she delivered this writing and two keys of the box to the defendant. The defendant did not present this writing or remove the contents of the box or go to the safety deposit box until after the death of Mrs. Russell, which occurred August 6, 1906. The instrument under which she held this box consisted of an application to rent safe No. 2419 at $5 per annum, payable quarterly, subject to certain rules of the deposit company, and furnished a description of herself for the purpose of identification and her signature. It also provided that in the event of her death she appointed her administrator to have full control of the contents of the box. Rent appears to have been paid by her up to May 7, 1906, and in arrears from that date.

On August 7, 1906, defendant presented the writing above quoted and the keys, and the safety deposit company entered a surrender of Mrs. Russell's lease of the box in the surrender book and the defendant paid for the quarter year rent due August 7, 1906, and took away the contents of the box. There was also evidence from which the circuit court was authorized to infer that the intention of Mrs. Russell was to put her property in such shape that not only the gift but the delivery to her brother of her furniture and the contents of the safety deposit box were to be contingent upon her death. The court found that the deceased intended to make a gift to the defendant, but that such intention was never consummated or carried into effect in her lifetime.

The question is whether there was a constructive delivery equivalent to an actual delivery. The case in this state most in point is *Crook v. First Nat. Bank,* 83 Wis. 31, 52 N. W. 1131. The case last mentioned, so far as it concerns the validity of the gift, was decided upon demurrer to an answer upon a situation where the pleadings taken together showed the form of the gift in writing, and an averment in the answer admitted by demurrer was to the effect that the donor by this writing intended to give and did give the fund in question to the donee. The writing contained sufficient ambiguity to make this an averment of fact admitted by the demurrer rather than a conclusion of law. If the court below found in the instant case that the writing in question was intended to give and did give to the defendant the contents of the safety deposit box the cases would be parallel. The court here found the contrary. This finding has the following evidence to support it: (1) The defendant did not present the writing of surrender of lease of Mrs. Russell until after her death. (2) In requesting instructions from the safety deposit company she wished to know what form of an order would be necessary so that this company would feel authorized and let her brother have access to her box. (3) The in-

strument requested the trust company to give over the contents and did not itself purport to transfer the contents. (4) A competent witness testified that Mrs. Russell said to defendant: "Now I will give you an order, and if anything should happen to me get them first before you should let it be known that I was gone, so that it will not go through the court." There was in this sufficient to support the finding of the circuit court, because it appeared that during the lifetime of the donor the safety deposit company did not, as requested, "give over" to defendant the contents of the box nor make any change in the situation or condition of such contents, and the acts of both parties furnish evidence that this was probably not intended to be done during the lifetime of the donor, but that the delivery should take place pursuant to said order after her death. The like intention is inferable from the evidence relating to the attempted gift of the furniture, which was entirely oral. *Wilcox v. Matteson,* 53 Wis. 23, 9 N. W. 814; *Schultz v. Becker,* 131 Wis. 235, 110 N. W. 214.

In all such cases of constructive delivery a finding of the trial court against the intention to make delivery before death necessarily presents a very formidable obstacle in the way of recovery by the donee, where there is evidence to support such finding.

Error is assigned on the refusal of the trial court to allow cross-examination of the mother of deceased as an adverse witness. If such error was made, the proper way to take advantage of it is to except to the ruling and proceed with the examination of the witness so as to disclose by her testimony whether the appellant was prejudiced by such ruling. As it is, we cannot say that the ruling was prejudicial to appellant. Neither was there error in excluding the testimony of Mr. Griggs. The court excluded this upon its determination of the preliminary question that deceased consulted Mr. Griggs as an attorney and the communication was privileged. *State v. Russell,* 83 Wis. 330, 337, 53 N. W. 441.

We do not feel warranted in overthrowing the decision of the trial court upon this preliminary question of fact, because there is considerable evidence to support it.

Error is assigned upon the refusal to grant a new trial upon newly discovered evidence consisting of the testimony of several inmates of Mrs. Russell's house and that of a prospective buyer of her furniture to declarations made by her to the effect that she had given the furniture and the contents of the safety deposit box to defendant. This evidence was cumulative or corroborative of other evidence offered on the trial by defendant. It is much weakened by contradictory statements or admissions alleged to have been made by the proposed witnesses and in other respects, and we cannot say that the trial court erred in refusing to grant a new trial thereon within the rule of *Jalie v. Cardinal,* 35 Wis. 118; *Hedger v. State, post,* p. 279, 128 N. W. 80.

By the Court.—Judgment of the circuit court is affirmed.

STICKNEY, Appellant, vs. BELL, Respondent.

November 17—December 6, 1910.

Boundaries: Conflicting surveys: Evidence.

The finding of a jury as to which one of two conflicting surveys established the true boundary line between the lands of the parties is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an action for trespass. The plaintiff owns the northwest quarter of the northeast quarter of section 32, township 17 north, of range 2 east, in Juneau county. The defendant owns the southwest quarter of the northeast quarter of the same section. The alleged trespass arose out of a

dispute as to the true boundary line between these two descriptions, and the acts of trespass complained of consisted in the defendant's entering upon the disputed strip and cutting and removing timber therefrom and in his building a fence along what he claimed to be the true boundary line, and destroying the fence built by the plaintiff on what the latter claims to be the true boundary line. The amount of land involved is about one acre. Surveyors were employed by each of the parties to locate the true line. They disagreed only in one material particular, and that was the location of the southwest corner of the section. The surveyors employed by the plaintiff located this corner, substantially following the government field-notes, midway between the south quarter-post of section 32 and the south quarter-post of section 31, in the same township, both of these quarter-posts being known government monuments. The surveyor employed by the defendant located this section corner four rods and fifteen links north and six rods and four links west of the corner as established by the surveyors for the plaintiff, and justified his action in so doing on the ground that he found the original government corner and at least two of the bearing trees marked in connection therewith, and also that he found evidences of the two remaining bearing trees which had disappeared but the roots of which were still in existence and which answered the call of the government field-notes. The surveyors for each of the parties substantially pursued a like method in subdividing the section, and no fault was found with the manner in which the surveyor employed by the defendant did his work in this regard. The west quarter-post of section 32 could not be found. By locating the southwest corner of the section where he did, the defendant's surveyor located the south line of the defendant's land somewhat north of where such line was located by the surveyors employed by the plaintiff. The jury found, among other things, that the survey made by defendant's surveyor was correct, and judgment was

entered upon such verdict for the defendant, from which judgment this appeal is taken. The only error argued was that the evidence was not sufficient to sustain the verdict.

For the appellant there were briefs by *James A. Stone*, attorney, and *G. Stevens*, of counsel, and oral argument by *Mr. Stone*.

J. T. Dithmar, attorney, and *Daniel H. Grady*, of counsel, for the respondent.

BARNES, J. An examination of the record convinces us that there was ample evidence in the case to support the finding of the jury to the effect that the survey made by the surveyor employed by the defendant established the true boundary line of the strip of land in controversy. This being so, the judgment of the trial court must be affirmed. It would serve no useful purpose to recite such evidence.

By the Court.—Judgment affirmed.

MISKE and another, Respondents, vs. THOM, Appellant.

November 17—December 6, 1910.

Sale of horse: Warranty: Evidence of unsoundness: Expert witnesses: Qualifications: Instructions to jury.

1. Evidence that a horse was sold within a week or two prior to his delivery to the purchaser on May 12, and that in the early part of June he was suffering from an advanced case of a disease which would take two or three months to develop to that stage, was sufficient to support a verdict that the horse was suffering from that disease when sold.
2. Veterinarians, shown to be graduates of veterinary colleges and to have actually practiced a number of years, were competent to testify as to glanders in a horse, where it was not shown that they derived their knowledge from books exclusively but was fairly to be inferred that they were testifying from experience.
3. It is not error to refuse requested instructions upon subjects fully and correctly covered by the general charge.

APPEAL from a judgment of the circuit court for Eau Claire county: A. J. VINJE, Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *W. H. Frawley & T. F. Frawley,* and for the respondents on that of *Sturdevant & Farr.*

WINSLOW, C. J. This is an action for breach of warranty of a horse which the plaintiffs purchased of the defendant under an alleged warranty of soundness, but which was found to be suffering from glanders soon after the purchase. The defendant denied the warranty, but upon the trial a general verdict was found for the plaintiff, assessing damages at $121.77, and from judgment on the verdict the defendant appeals.

The errors claimed will be briefly noticed.

1. It is claimed that there was no evidence tending to show that the horse had glanders at the time of the sale. This claim is untenable. The time of the sale was in dispute, but the horse was delivered on the 12th day of May, and there was sufficient evidence to justify the jury in finding that the sale took place within a week or two prior to that date. Two veterinary surgeons examined the horse in the early part of June, and testified that it was then suffering from an advanced case of glanders which would take two or three months to develop. This was sufficient evidence, if believed by the jury, to warrant the conclusion that the horse was suffering from the disease when purchased.

2. It is said that the veterinary surgeons were not qualified to testify as experts because they were unregistered (*McCann v. Ullman,* 109 Wis. 574, 85 N. W. 493), and because they did not show that they had ever had knowledge of glanders from personal experience in treating the disease. Neither objection has any weight. The statute requiring registration of veterinarians was repealed by ch. 334, Laws of 1907. While the veterinarians did not testify to personal experience

with glanders, they were both shown to be graduates of veterinary colleges and to have actively practiced a number of years. They did not state that they derived their knowledge from medical works exclusively, unaided by practical experience. The defendant did not choose either preliminarily or otherwise to ask them with reference to their practical knowledge, and the fair inference is that they were testifying from experience and not from books. *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 99 N. W. 217; *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518.

3. Complaint is made because the court did not give to the jury certain specific instructions as to the burden of proof and the preponderance of evidence, but as these subjects were fully and correctly covered in the general charge of the court there was no error in refusing the instructions asked by the appellant.

Some minor objections are made, but they are so trivial and manifestly without foundation that we do not find it necessary to treat them in detail.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

COMSTOCK, Respondent, vs. BOYLE and others, imp., Appellants.

November 17—December 6, 1910.

Wills: Construction: Bequests for soldiers' orphans: State as trustee: Right to reimburse itself: Title to land: Exemption from taxation.

1. A bequest made in 1865 "to the various asylums or homes that have been formed or may be formed within a year throughout the loyal states for the orphans by the late war for the restoration of the Union," together with an intimation of the testa-

tor's wish that for a time the interest only be used "and that the bequest be so managed as to give the orphans, as they become of age, a sum of money to fit them out in life and thus gradually extinguish the fund," made the inmates of the institutions, and not the institutions themselves, beneficiaries, and evinced a clear intent that not only the interest but the corpus of the fund should go to the orphans.

2. So, also, a subsequent bequest to the trustees of the Wisconsin Orphans' Home "for the benefit of the children," constituted the orphans the beneficiaries.

3. The funds above mentioned, or a residue thereof, being held by the state in trust, the fact that it had been engaged in a similar charity and had spent large sums of its own money for the care and maintenance of the same orphans would not entitle it to reimburse itself out of said funds.

4. Where, out of funds so held in trust by the state, land was purchased and title thereto taken by the state "in trust," such land was not "owned exclusively" by the state, within the meaning of subd. 2, sec. 1038, Stats. (1898), so as to be exempt from taxation.

5. Exclusive ownership, within the meaning of said statute, is ownership free from any kind of legal or equitable interest in any one else.

APPEAL from a judgment of the circuit court for Fond du Lac county: A. H. REID, Judge. *Affirmed.*

In 1865 Horatio Ward, an American banker residing in London, England, made a bequest "to the various asylums or homes that have been formed or may be formed within a year throughout the loyal states for the orphans by the late war for the restoration of the Union." Among other provisions his will contained this:

"I judge that the interest only, for a time, will be used, and that the bequest be so managed as to give the orphans, as they become of age, a sum of money to fit them out in life and thus gradually extinguish the fund—this course would be in exact accord with my wishes."

In 1867 the testator died. By an act of the legislature, approved March 31, 1866, the state of Wisconsin established the "Soldiers' Orphans' Home of Wisconsin," and in 1871 it received from the Ward bequest the sum of $25,554.79.

Some considerable time after Mr. Ward's death, Miss Caroline E. Smith, formerly of Waukesha, died in Chicago, leaving by her will $2,000 to the trustees of the Wisconsin Orphans' Home for the benefit of the children. In 1872 this bequest was paid to the trustees and deposited with the Ward fund, and thereafter a separate account was kept in the books of the state treasurer under the head of the "Ward and Smith Bequests Fund." It is still so kept.

The purpose of the testator, Ward, that the fund should be extinguished by distribution among the orphans to fit them out in life, was partly executed in 1874 when the trustees issued to each of them a certificate of $45. But, owing to the fact that all did not call for their certificates, there was quite a balance left in 1877, and a second series of certificates for $10 each was issued. This distribution also failed to completely exhaust the fund, and in 1887 there was still a balance left. The Home was closed in 1875, and pursuant to ch. 306, Laws of 1875, the real estate was transferred to the regents of the State University, but the trustees still continued to act, and in 1887 it came to their attention that one of the beneficiaries was in destitute circumstances. Their action relative thereto is stated as follows in their final report:

"During 1887 it came to the knowledge of the board that one of the boys from the Home, named Charles A. Randall, residing in the city of Fond du Lac, who had a wife and two children, was, on account of poor health, in a state of destitution, and that, unless help was given him, he would probably become dependent on public charity. This boy suffered while at the Home a very severe illness, barely escaping death, in consequence of which his physical development was arrested. He was dwarfed in stature and not strong. In competition in the field of labor, with strong, full-grown men, he was crowded to the wall. He was industrious and fond of gardening—was somewhat skilled in the art. So from the Ward and Smith fund we appropriated a sum sufficient to purchase within the corporate limits of Fond du Lac three acres of ground fenced, for a truck garden. One of the mem-

bers of the board purchased the lumber and superintended the erection on the ground of a warm, comfortable shanty house and small shed barn, costing $160; we also purchased for him a cow and put him in possession of the premises and told him that he could occupy them for as long a time as he wished without cost, except taxes. The whole establishment costs $700. But that there might be no temptation presented to him to mortgage or sell the place we placed the title in trust in the state of Wisconsin. For a few years he prospered and was happy, cultivating his truck garden. But subsequently he was taken sick and died; and his widow with her children abandoned the place in order to go to her people who lived in the northwestern part of the state."

This land in question was taxed in 1887, but it does not appear whether the tax was paid or redeemed. It was again taxed in 1888, sold at the tax sale of 1889 to the county, and redeemed from the county by C. K. Pier April 4, 1892. It was not taxed in 1889, 1890, nor 1891, but in 1892 it was trebly assessed for the years 1890, 1891, and 1892, and the tax levied and the property sold therefor at the tax sale of 1893 to Kate Pier. In 1896 the tax certificate was, on the petition of Kate Pier setting forth that the property belonged to the state of Wisconsin and was not subject to taxation, canceled by order of the county board for that reason. The land was, nevertheless, again taxed in the years 1893, 1894, 1895, and 1896, and sold at the annual tax sales succeeding the same years, to George Radford, and thereupon, in due time, tax deeds based upon said tax sales were issued to said Radford and by him recorded. The land was taxed successively in 1897, 1898, 1899, and 1900, and the taxes were paid by George Radford. In 1901 the property was assessed to the state of Wisconsin as owner, but not sold. In 1902 and 1903 it was not assessed. By quitclaim deed dated March 17, 1904, George Radford conveyed this property to the plaintiff.

On April 25, 1887, when one Mary A. Hamilton deeded this land in question to the state of Wisconsin in trust, she was the owner in fee thereof. Sec. 1, ch. 375, Laws of 1895,

authorized Mr. C. K. Pier, the secretary of the board of trustees, to sell the land and convey all the title held by the state and pay the net proceeds of the sale into the state treasury to the credit of the account known as the Ward and Smith fund. Sec. 2 provided:

"The state treasurer shall thereupon transfer the balance in the Ward and Smith fund to the general fund, and it shall be his duty to pay therefrom any and all certificates issued by said trustees and held by those who were formerly inmates of the Wisconsin Soldiers' Orphans' Home, as same are presented by those entitled to receive payment on same, not exceeding, however, in the aggregate, the amount so transferred from the Ward and Smith account to the general fund."

The act then provided for the approval of the final report of the trustees and abolished the board. Mr. Pier having died without making a sale, the commissioners of public lands were, by ch. 71, Laws of 1899, authorized to sell the land, and on May 24, 1904, they sold it to the defendant *John T. Boyle* and a patent was issued to him. He immediately entered into possession of it, and plaintiff brought an action of ejectment. A jury was waived, and the court found that plaintiff was the owner in fee and entitled to the possession thereof. From judgment entered accordingly the defendants appealed.

For the appellants there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

For the respondent there was a brief by *H. E. Swett,* and oral argument by *John J. Wood, Jr.*

VINJE, J. It is conceded by the defendants that if the land was taxable when the taxes on which the tax deeds are based were assessed against it, then plaintiff's tax title is valid. The sole question for determination, therefore, is whether or not the land was taxable in the years 1893, 1894, 1895, and 1896. The defendants claimed that the land belonged to the state exclusively, and that under subd. 2, sec. 1038, Stats.

(1898), which provides that property "owned exclusively by the United States or by this state" shall be exempt from taxation, it was not taxable.

It is evident that it was the intent of the testator, Ward, to make the inmates of the institutions, and not the institutions themselves, the beneficiaries of his gift. That portion of his will which reads, "I judge that the interest only, for a time, will be used, and that the bequest be so managed as to give the orphans, as they become of age, a sum of money to fit them out in life and thus gradually extinguish the fund—this course would be in exact accord with my wishes," evinces a clear intent that not only the interest but also the corpus of the gift should go to the orphans. The inmates of institutions managed by private parties as well as of those managed by the states were to share in the gift, for the bequest was "to the various asylums or homes that have been formed or may be formed within a year *throughout* the loyal states for the orphans by the late war for the restoration of the Union." The bequest of Miss Smith was to the trustees of the Wisconsin Orphans' Home *for the benefit of the children.* So it must be held that both bequests constituted the orphans the beneficiaries. That this was recognized by the trustees and the state is evident from the fact that the Ward and Smith Bequests Fund was kept separate from all other funds. The trust relation was also clearly recognized when the balance of the fund was transferred to the general fund, for it was provided by the legislature that the state treasurer should pay out of the general fund any and all certificates issued by the trustees not exceeding in the aggregate the amount so transferred from the Ward and Smith account to the general fund. This provision was tantamount to saying that the balance of the Ward and Smith account belonged to the orphans, but would be transferred to the general fund and paid to them out of that whenever a proper demand was made.

But the defendants argue that the evidence shows the state

spent large sums of its own money for the care and maintenance of the orphans, and it is therefore entitled to reimburse itself out of their fund, conceding it belonged to them, and that if it did so the whole trust fund would be exhausted. The evident answer to this is that the fact the state was engaged in a similar charity would not entitle it to reimburse itself for money spent therein out of other funds held in trust by it. Nor has it sought to so reimburse itself. It has, as above stated, always recognized that it held the fund in trust for the orphans, even after the moneys were turned into the general fund, for it provided for a repayment to them upon presentation of proper vouchers to the whole extent of the fund.

It is undisputed that the $700 used in the purchase of the land in question was taken from the Ward and Smith Bequests Fund, and as the state was not the owner, but only the trustee thereof, it is evident that the fact that it used a portion of the fund for the purchase of real estate (contrary perhaps to the provisions of the bequests) and took title to itself "in trust" could not make it the owner, much less the exclusive owner, of the land so purchased. Exclusive ownership is necessarily ownership free from any kind of legal or equitable interest in any one else. *Merrill R. & L. Co. v. Merrill,* 119 Wis. 249, 96 N. W. 686; *Dickinson Co. v. Baldwin,* 29 Kan. 538. But here the beneficial, equitable ownership of the land was in the *cestuis que trustent,* and it is immaterial whether Randall alone was the *cestui que trust* or whether all the surviving orphans were the *cestuis que trustent.* In either event the beneficial ownership of the land was in a private person or persons. The fact that the state held the title in trust would not exempt it from taxation. *St. Louis v. Wenneker,* 145 Mo. 230, 47 S. W. 105; *McChesney v. People ex rel. Johnson,* 99 Ill. 216; *Dickinson Co. v. Baldwin,* 29 Kan. 538; *Mitchelville v. Sup'rs,* 64 Iowa, 554, 21 N. W. 31; 1 Cooley, Taxation (3d ed.) 266. The court, therefore, prop-

erly found that plaintiff was the owner in fee of the land and entitled to judgment.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

NOBARAK, Respondent, vs. SIMMONS and another, imp., Appellants.

November 17—December 6, 1910.

Jurisdiction: Deposit to indemnify sureties, etc.: Control by court.

Prior to the commencement of an action by a nonresident of this state against residents, money was deposited by a person not a party to the action to indemnify sureties for any loss they might sustain by signing an undertaking for costs on behalf of the plaintiff and to indemnify his attorneys for any costs which might be awarded against them. *Held*, that the court in which the action was tried had no jurisdiction to direct the application of any part of such money to a purpose other than that for which it was deposited (as, for instance, to satisfy the service claims of the plaintiff's attorneys), without the consent of the depositor, even though the attorneys for all parties to the action stipulated that it be so applied.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover the value of a deposit claimed to have been made by plaintiff with defendants and wrongfully converted to their own use. The subject of deposit was $250. The answer was to this effect: One Charles Amien, a nonresident of this state, being about to commence an action against three residents thereof for false imprisonment, procured plaintiff to deposit with defendants $250 to indemnify them for any loss they might sustain by signing an undertaking for costs on behalf of Amien, and to indemnify Amien's attorneys for

any costs which might be awarded against them in the action. The deposit having been made and the undertaking signed the action was commenced. Such proceedings were duly had therein that Amien was adjudged to pay costs to the amount of $96.34. Thereafter the judgment was duly paid out of the money aforesaid, demand therefor upon the sureties having been made. Thereafter, by order of the circuit court made in the action, the balance of the deposit was paid to Amien's attorneys.

The evidence established the following as facts: Plaintiff deposited in defendants' bank $250 to indemnify defendants *Simmons* and *Potter* for signing the undertaking mentioned in the pleadings. A receipt was given to him by *Simmons*, as cashier of the bank, to the effect that the money was held "for bond liability of Charles Amien in the action" mentioned in the answer. Amien was a nonresident. The undertaking was in the ordinary form used in such cases. After Amien's action was dismissed and judgment for costs rendered against him and paid out of the deposit of $250, as indicated in the answer, his attorneys procured a stipulation to be signed, in form as an agreement between the attorneys for the respective parties in the action, to the effect that the balance of the money deposited by plaintiff should be paid over to Amien or his attorneys. Afterwards such attorneys presented such stipulation to the court and thereon caused an order to be made discharging the sureties on the undertaking and directing them to pay over the balance of the money in their hands to Amien's attorneys, in accordance with the stipulation. Subsequently the order was complied with, the amount of the fund, including some accrued interest, being $153.66. Plaintiff did not consent to the stipulation. He did not know of it or of the payment of money to the attorneys, or consent to such payment, or to use of the money at all, except such as was required to be paid to the clerk. As soon as plaintiff learned that the sureties on the undertaking

had been discharged, he made due demand for a return of the money deposited by him, except such as had been used to save them from liability. The demand was refused and thereupon this action was brought. The defendants claimed they were protected by the order of court. The plaintiff claimed that the court had no jurisdiction to interfere in the private matters between himself, who was not a party to any proceedings in court, and the defendants who controlled his money, and no jurisdiction over his money, it not being *in custodia legis*. The court directed a verdict in favor of the plaintiff and against defendants *Simmons* and *Potter* for $163.06, and a verdict of no cause of action as to defendant bank.

The cause was submitted for the appellants on the brief of *Duffy & McCrory,* and for the respondent on that of *T. L. Doyle.*

MARSHALL, J. Appellants complain because the trial court did not, at the close of respondent's case in chief, dismiss the action as to defendant Commercial National Bank. It is a sufficient answer thereto, that appellants were not in any way prejudiced thereby, and as the bank has not appealed, any grievance as to it is not here for consideration.

It is suggested that appellants were bound to pay over the money, as they did, to the attorneys; that they would have been guilty of contempt in refusing to do so. Counsel fail to appreciate that the relations between appellants and respondent were not subject to judicial interference in the Amien action. Respondent was not a party thereto in any way. The court had no more right to order his money, because it happened to be on deposit with appellants for a particular purpose, applied to a different one, than to order the money of any other stranger to the litigation, which happened to be under appellants' control, if any, disbursed to satisfy the service claims of the attorneys for defendants in the Amien action. The court

was without the slightest semblance of jurisdiction to make the order for confiscation of respondent's money. The mere fact that Amien's attorneys signed the stipulation for the order is of no significance. They were not the attorneys for respondent. The whole proceeding, as to all the parties concerned, was extra-judicial. An order of that character is of no force. It is no more a sufficient basis for contempt proceedings in case of its being ignored than would be the order of a person not clothed with the judicial office so as to be capable of making a judicial order, good in form.

No more need be said. There is no merit in the appeal.

By the Court.—The judgment is affirmed.

PRICE, Respondent, vs. BANK OF POYNETTE and others, Appellants.

November 17—December 6, 1910.

Duress: What constitutes: Threatening arrest of son: Sufficiency of evidence: Verdict: Construction and sufficiency.

1. Duress, in its broad sense, now includes all instances where a condition of mind, caused by fear of personal injury or injury to one's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering the person affected incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.
2. To constitute duress by threats they must be of such a nature and made under such circumstances as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must have been performed by him while in such condition.
3. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself, but the controlling element in each case is whether the means used, considering all the circumstances of the case, are such as to prevent the free exercise of the will power.
4. It is not necessary that threats of criminal prosecution, when these are the means used, should be made directly; if made to

a third person with intent that they be communicated, and they are so communicated, that is sufficient.

5. The evidence in this case is *held* to support the verdict to the effect that plaintiff was induced by threats of arrest and prosecution of his son for misappropriation of the funds of a bank in which the son had been employed, to sign a bill of sale of the property in question, and that such threats so affected his mental condition that he was incapable of the free exercise of his will power.

6. In answer to the first two questions of the special verdict the jury found that defendants made the alleged threat to induce the signing, and that plaintiff was induced thereby to sign; to the third question, "Did such threat so affect the plaintiff's mental condition that at the time he signed the bill of sale he was incapable of the free exercise of his will power?" they answered "Yes, partially." *Held*, that the last answer is not indefinite or uncertain; that, properly construed, it means that the threat so partially affected plaintiff's mental condition that he was incapable of the free exercise of his will power, but even if it means that he was *partially incapable* of such free exercise it is a sufficient finding of duress.

BARNES and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This action was brought to recover the value of certain personal property claimed to have been obtained from plaintiff, *James Price,* by defendants through fraud, duress, and without consideration.

The answer sets up misappropriation of money by plaintiff's son, Fred C. Price, while in the employ of defendants, and that on May 7, 1906, said Fred did turn over to defendants property in part payment, and that afterwards the full amount of the misappropriation was discovered and that the property in the bill of sale was turned over to defendants in part payment of such money; that all money paid defendants on account of the misappropriation was insufficient to pay it; that plaintiff had profited by Fred's misappropriation of the money of defendants. Defendants also deny generally the allegations of the complaint, and further allege that the certificate of deposit for $200 mentioned in the complaint was

the property of defendants. The following receipt was given by defendants showing the property received in reimbursement of money taken by Fred C. Price:

"Received of Fred C. Price the following certificates against the *Bank of Poynette:*

Number 5416, *James Price*, for	$200 00
Number 5231, Esther E. Price	50 00
Number 4651, Esther E. Price	100 00
Number 5659, J. J. Price, for	55 00
Note against T. W. Cutsforth, for	34 50
Note against Wm. Trout, for	31 00
Four notes against James Insley, for	175 00
Note against Thos. H. Tomlinson, for	90 00
Note against George Cook, for	20 80
Note against J. E. Foster, for	33 00
Note against R. F. Buzzell, for	32 28
Note against M. E. B. Thompson, for	105 00
Note against George White, for	52 30
Note against C. M. Theissen, for	300 00
Books account against John Jamieson, for	335 00
Books account against Frank Hadden, for	411 09
Books account collected by G. L. Schwartz and proceeds turned in, for	54 72
Note and mortgage given us by Ira C. Luce, for	2,000 00
Horse, buggy, cutter, harness, etc., etc.	200 00
Warranty deed from *James Price* and wife	12,000 00
Warranty deed from F. C. Price and wife and E. C. Price and wife	18,000 00
Warranty deed from F. C. Price and wife, for homestead, house and lot	4,000 00
Bill of sale of hardware stock	9,017 81
Three certificates against the *Bank of Poynette*, notes and cash turned over Jan. 4, 1906	3,000 00
Personal property from Minnesota farm, after deducting Price Brothers' overdraft	1,409 24
Cash and sundry small items	150 85
One note signed by *James Price*, Fred C. Price, Nell Price and others, for	6,000 00
Making a total of	$57,857 59

"Above amount being turned over to us by said Fred C. Price to reimburse us for the moneys taken from us and the *Bank of Poynette,* and discovered at this date, May 28, 1906. Said moneys having been fraudulently taken and misappropriated by said Price.

"JAMIESON BROTHERS and
"BANK OF POYNETTE,
"H. P. JAMIESON, Cashier."

The jury returned the following verdict:

"(1) Did the defendants or any of them, to induce the signing of the bill of sale, threaten to have the plaintiff's son prosecuted criminally unless the plaintiff signed the bill? *A.* Yes.

"(2) If to the above question you answer 'Yes,' then answer this question; if to the above question you answer 'No,' you need not answer this question: Was he induced by such threat to sign the bill of sale? *A.* Yes.

"(3) If you answer question No. 1 'Yes,' then answer this question; if you answer question No. 1 'No,' you need not answer this question: Did such threat so affect the plaintiff's mental condition that at the time he signed the bill of sale he was incapable of the free exercise of his will power? *A.* Yes, partially.

"(4) Was the plaintiff, at the time of the execution of the bill of sale, the owner of the two-hundred-dollar certificate of deposit described in the complaint? *A.* Yes.

"(5) Had the plaintiff, during all the time Fred Price was running the farm, been the owner of any of the cows described in the bill of sale? *A.* Yes.

"(6) If you answer 'Yes' to the questions above, then state the number of cows so owned and their value. *A.* Number, two. Value, seventy-five dollars.

"(7) What was the value of the wood included in the bill of sale? *A.* Ninety-six and seventy-five hundredths dollars.

"(8) Did the plaintiff, at the time the bill of sale was signed, own the rest of the personal property described in the bill of sale? *A.* Yes.

"(9) If to the above question you answer 'Yes,' then state the value of the rest of the property included in the bill of sale? *A.* Seven hundred and seventy-seven and seventy-four hundredths dollars ($777.74).

"(10) Did the consideration of twelve thousand dollars expressed in the deed of the plaintiff's farm and house and lot include the personal property situated on the farm? *A.* No."

Motions by defendants for nonsuit, directed verdict, to change answers to the questions in the special verdict, and for a new trial were denied, and judgment ordered for plaintiff

on the verdict. Judgment was entered accordingly, from which this appeal was taken.

For the appellants there was a brief by *John A. Aylward* and *H. E. Andrews*, and oral argument by *Mr. Aylward*.

Daniel H. Grady, for the respondent.

KERWIN, J. The defendants *H. P.*, *A. J.*, and *J. C. Jamieson* were the owners of the defendant *Bank of Poynette* and also the owners of a large amount of other property at Poynette, Arlington, and in that vicinity. Fred C. Price, a son of plaintiff, had been in the employ of defendants for several years prior to 1906 in the capacity of clerk, bookkeeper, and general utility man of the defendant bank. Early in 1906 it was discovered that Fred C. Price had misappropriated a large amount of money belonging to the defendant bank. Fred admitted his guilt and turned over such property as he had to the defendants. Other relatives of Fred also turned over property to defendants to help make up the shortage. At first the amount of the shortage was not known, but upon investigation it turned out to be $57,857.59. Before the amount of the shortage was known and on February 16, 1906, the plaintiff and his wife made a deed of certain lands in the county of Columbia to defendant *A. J. Jamieson* to secure payment of the amount of shortage of their son, Fred C. Price, which might be discovered upon full investigation, and defendant *A. J. Jamieson* executed and delivered an agreement to the effect that upon payment in full to defendants of all sums misappropriated by Fred C. Price without loss or expense to defendants he would reconvey to plaintiff the described premises conveyed to him. At this time it was not supposed that the amount of the shortage was as large as it was afterwards found to be. After the full amount had been ascertained other relatives turned over other property to make up the amount. Fred C. Price was not retained in the employ of defendants after January 4, 1906, and one Stroud,

who was then county judge, was employed by defendants in the matter. Defendants were cautioned by Stroud to make no threats or promises and to keep the matter of the defalcation as quiet as possible. On February 16, 1906, shortage to the amount of $30,000 had been discovered. An effort was made to obtain a bond in the sum of $50,000 from Mr. Wilson, father-in-law of Fred C. Price, which failed, whereupon the conditional deed before referred to was given by plaintiff and his wife. On the 16th day of February, 1906, a bill of sale of hardware stock in store was also executed by Fred C. Price and Albert Price and delivered to defendants in further satisfaction of the shortage, and the investigation of the books continued until the whole amount of shortage was ascertained and agreed upon May 7, 1906. On the 13th day of April, 1906, Fred C. Price and Charles E. Price and their wives conveyed certain farm lands in Minnesota to defendant *A. J. Jamieson* in further satisfaction of said shortage, the consideration named in said deed being $20,000, subject to a mortgage of $2,000. One Ira C. Luce, a brother-in-law of Fred C. Price, about the time of the execution of the bill of sale in question made a $2,000 mortgage to defendants in part satisfaction of the shortage. Other relatives of Fred contributed other amounts at or about the time of the execution of the bill of sale in question, the whole shortage having been made up except $6,000, and a note was drawn for this amount and signed by plaintiff with the understanding that it was to be signed by other relatives, which was done. It also appears from the receipt given by defendants that the entire shortage was made up by various contributions, including the $6,000 note, without the property described in the bill of sale in question. Point was made on the trial that the consideration of $12,000 mentioned in the receipt given for one of the farms turned over included the personal property in the bill of sale, but the jury negatived this in the tenth finding.

From the time of the discovery of the misappropriation

down to the time the bill of sale was executed the plaintiff and his relatives were pressed to make up the amount, and there is ample evidence that they were led to believe, by threats made both directly and indirectly, that Fred would be prosecuted criminally if the shortage was not paid. Threats were made to relatives, knowledge of which was brought home to the plaintiff, that if the amount was not paid Fred would be "sent over the road," or words to that effect, and that if the amount was paid or secured no arrest would be made. There can be no doubt but that the jury were entitled to find that these threats terrorized the plaintiff. The evidence shows that the plaintiff and his family, previous to the discovery of the misappropriation, had borne a good reputation in the community, and plaintiff was solicitous about such reputation and willing to do anything in his power to prevent the arrest of his son Fred. In February, 1906, plaintiff was called to defendants' bank and informed of the embezzlement and informed by the attorney of defendants that if he would give the defendants a trust deed of his property there would be no arrest, and plaintiff said he was willing to do what was right to keep Fred out of prison, and would do whatever they said was right, and that he could not do otherwise than leave it to them to say what was right. The evidence shows that shortly before May 26, 1906, defendant *H. P. Jamieson* stated to Ira C. Luce, brother-in-law of Fred C. Price, that the relatives of Fred would have to come to the rescue, and Ira said he did not feel as though he could, and defendant *Jamieson* said he would or he would put Fred over the road, and that *Jamieson* also demanded of Albert Price that he turn over the hardware stock, and that if he would not Fred would go over the road, and that this was communicated to plaintiff and his wife.

The evidence further tends to show that plaintiff was called to the defendants' bank on or about May 23, 1906, and demand made by defendants that he make an absolute deed of

the real estate which he had formerly conveyed to defendants as security, also that he sign the $6,000 note and bill of sale in question; that plaintiff made the absolute deed as required, but refused to sign the bill of sale in question, whereupon the prosecution of plaintiff's son Fred was threatened; that a deed of plaintiff's homestead was also required by defendants and their attorney; that plaintiff stated that if they took that they would take every dollar he had; that defendants' attorney at this time also spoke about arresting another of plaintiff's sons, who was then in Minnesota, for concealing stolen property; that defendants also required some firewood worth about $96 to be included in the bill of sale; that plaintiff then objected to signing the note or bill of sale, and one of the defendants then said that if he did not he would send Fred up or have him arrested. Plaintiff thereupon signed the bill of sale. He testified that he signed it to keep his son Fred out of prison, and that he signed it after defendants said they would send Fred to prison if he did not sign it.

Further recital of the evidence would seem unnecessary. It is ample to support the verdict to the effect that plaintiff was induced by threats to sign the bill of sale, and that such threats so affected the plaintiff's mental condition that at the time he signed the bill of sale he was incapable of the free exercise of his will power. The plaintiff at time of signing was seventy-four years of age, greatly distressed, and willing to do any thing possible, as the evidence tends to show, to save his son from arrest. This seems manifest from the fact that he turned over everything he had, including his little homestead and even his woodpile, when in fact, as appears from the defendants' receipt in evidence, the full amount of the shortage had been paid without the property covered by the bill of sale. But whether the articles covered by the bill of sale were necessary to complete the amount of the shortage or not is not material, since the evidence is ample to support the verdict that the bill of sale was executed by the plaintiff while

under duress. What constitutes duress has been often considered and discussed by this court. *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495; *McCormick H. M. Co. v. Hamilton,* 73 Wis. 486, 41 N. W. 727; *Schultz v. Catlin,* 78 Wis. 611, 47 N. W. 946; *Mack v. Prang,* 104 Wis. 1, 79 N. W. 770; *Wolff v. Bluhm,* 95 Wis. 257, 70 N. W. 73; *City Nat. Bank v. Kusworm,* 91 Wis. 166, 64 N. W. 843; *Rochester M. T. Works v. Weiss,* 108 Wis. 545, 84 N. W. 866; *Bennett v. Luby,* 112 Wis. 118, 88 N. W. 37; *Batavian Bank v. North,* 114 Wis. 637, 645, 90 N. W. 1016; *Fred Rueping L. Co. v. Watke,* 135 Wis. 616, 116 N. W. 174. In defining duress in *Galusha v. Sherman,* 105 Wis. 263, at pages 277 and 278 (81 N. W. 500), this court said:

"Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion. . . . There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the

means may be so oppressive as to render the result an inference of law."

The controlling element in such cases seems to be whether the means used, considering all the circumstances of the case, are such as to prevent the free exercise of the will power. *Galusha v. Sherman, supra.* In *McCormick H. M. Co. v. Hamilton, supra,* there had been threats of criminal prosecution which it was claimed induced the signing of a mortgage. No physical restraint had been exercised, but the threat was of imprisonment of the son of the person induced to sign the mortgage, and it was held that such threats were sufficient to unduly influence and overpower the person signing the mortgage so that she did not act of her own free will and therefore did not sign away her homestead of her own free will, and that such acts should be declared void. Nor is it necessary that threats should be made directly. If they are made to a third person, with intent that they be communicated, and they are so communicated, that is sufficient. *Schultz v. Catlin,* 78 Wis. 611, 613, 47 N. W. 946.

Mack v. Prang, 104 Wis. 1, 79 N. W. 770, is quite in point. In that case there were threats to imprison Prang for embezzlement unless Mrs. Prang would give a mortgage. She at first refused, considered the matter for a day or two, and then executed the mortgage to prevent her husband from being sent to jail. The court said (pages 4 and 5): "Facts substantially similar to these have frequently been held to constitute duress which renders voidable a security or contract executed under their influence." See, also, *City Nat. Bank v. Kusworm,* 88 Wis. 188, 59 N. W. 564. It is true that in order to constitute duress "the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition." The following cases are mainly relied upon by appellant:

Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73; *Fred Rueping L. Co. v. Watke,* 135 Wis. 616, 116 N. W. 174; *Bennett v. Luby,* 112 Wis. 118, 88 N. W. 37; *Rochester M. T. Works v. Weiss,* 108 Wis. 545, 84 N. W. 866; *City Nat. Bank v. Kusworm,* 91 Wis. 166, 64 N. W. 843; and *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495. But we think the conclusion we have reached in the instant case, in view of the evidence, is not out of harmony with the cases relied upon by appellant.

On the point of the right to recover for the $200 certificate of deposit, the court is of opinion that there is ample evidence to support the answer of the jury to the fourth question of the special verdict to the effect that the plaintiff was the owner of said certificate.

It is further argued by counsel for appellant that the answer to the third question of the special verdict is uncertain, defective, and meaningless, hence there should be a new trial. By the answers to the first and second questions of the special verdict the jury found unequivocally that the defendants, or some of them, to induce the signing, threatened the plaintiff, and that plaintiff was induced by such threat to sign the bill of sale. To the third question, "Did such threat so affect the plaintiff's mental condition that at the time he signed the bill of sale he was incapable of the free exercise of his will power?" the jury answered "Yes, partially." The question arises as to the proper construction of this answer, or what did the jury mean by it when considered in connection with questions 1 and 2 of the verdict. The jury by their answers to the first and second questions had found that defendants made the threat to induce the signing, and that the plaintiff was induced by the threat to sign. These questions standing alone would seem to negative the idea of the free exercise of the will power by plaintiff in signing the bill of sale. But we are met with the answer to the third question, and it is said by appellants' counsel that this is a decisive question and is meaningless and therefore the verdict cannot stand. And it

is argued that the word "partially" in the verdict qualifies the phrase "free exercise of his will power" and not the phrase "plaintiff's mental condition." Even if the word "partially" qualifies as argued by appellants, still it would seem difficult to adopt the conclusion contended for. How plaintiff could be in the free exercise of his will power when the threats rendered him partially incapable of the free exercise of his will power is not easy to see. There would seem to be no middle ground in the free exercise of one's will power. One is in the free exercise of his will power or he is not, and one cannot make a valid contract when he is partially incapable of the free exercise of his will power. He must be in possession of his faculties and able to use them. Free exercise of the will power must mean without restraint. In *First Nat. Bank v. Sargeant,* 65 Neb. 601, 91 N. W. 597, 59 L. R. A. 299, the court approved the following definition of duress: "Duress may be defined as an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such other person to do or perform some act which he is not legally bound to do, contrary to his will and inclination," and said: "It is obvious that, if the act is done contrary to the will and inclination of the injured party, it cannot be the exercise of his free will. His will is subjected to that of another, and he is compelled to yield and submit to an illegal exaction because of the dominant power." *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Baker v. Morton,* 12 Wall. 150; *Parmentier v. Pater,* 13 Oreg. 121, 9 Pac. 59; *Mack v. Prang,* 104 Wis. 1, 79 N. W. 770; *Wolff v. Bluhm,* 95 Wis. 257, 70 N. W. 73; *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495; *Lee v. Burnham,* 82 Wis. 209, 52 N. W. 255. But the court is of opinion that the proper construction of the answer is that the threat so partially affected the mental condition of the plaintiff as to render him incapable of the free exercise of his will power. This appears to be the logical meaning of the answer, and the one which the jury intended in view of their

answers to questions 1 and 2 and the circumstances of the case. The free exercise of the will power depends upon the mental condition, and the threat affects the mental condition, and the mental condition controls the exercise of the will power. So we think the answer means that the threat so partially affected the mental condition of the plaintiff that at the time he signed the bill of sale he was incapable of the free exercise of his will power.

Error is assigned upon rulings on evidence, and also upon remarks of the judge upon the trial. It is sufficient to say that we find no error in these respects. We desire to say in passing that no opinion is expressed on the sufficiency of the evidence as to the validity of any instrument executed by the plaintiff in the transaction in question, except the bill of sale.

We find no reversible error in the record, therefore the judgment of the court below must be affirmed.

By the Court.—The judgment is affirmed.

BARNES, J. (*dissenting*). The evidence to show duress was slight, but was perhaps sufficient to carry the case to the jury. Accepting the verdict as a verity, it, in connection with the uncontradicted evidence in the case, shows that the parties to this action were *particeps criminis* in compounding a felony. This being so, the law should leave them where it found them, and refuse to afford relief by restoring to one of them the property which he parted with as a consideration for the unlawful promise exacted.

Furthermore, I think that a finding that the plaintiff was *partially* incapable of exercising his free will when he signed the bill of sale by reason of the threats made, negatives the idea that he signed the same under legal duress. As I understand the rule, the threats must produce such a condition of mind as to destroy the free agency of the person threatened, in order to constitute duress. *Batavian Bank v. North,* 114 Wis. 637, 90 N. W. 1016; *Galusha v. Sherman,* 105 Wis. 263,

81 N. W. 495; *Wolff v. Bluhm,* 95 Wis. 257, 70 N. W. 73. It seems to me that the finding falls short of establishing as a fact that the threat was the controlling cause that induced the plaintiff to execute the instrument.

MARSHALL, J. I concur in the dissenting opinion by Mr. Justice BARNES.

SLY, Respondent, vs. VILLAGE OF KILBOURN CITY, Appellant.

November 17—December 6, 1910.

Bill of exceptions: Service: Extension of time: Appealable order: Discretion: Terms.

1. The time limited in sec. 2876, Stats. (1898), for service of a proposed bill of exceptions may, after its expiration, be extended by the circuit court in discretion and upon conditions.
2. An order so extending such time is within subd. 2, sec. 3069, Stats. (1898), and appealable if there is an abuse of discretion. Language used in *Hatch v. Kurtzweil,* 112 Wis. 231, and *Wood v. Blythe,* 42 Wis. 300, corrected and restrained.
3. As a condition of granting such order the circuit court may require the moving party to stipulate that the cause be placed on the calendar for the next term of the supreme court and to perfect the appeal within ten days, in default of which the motion should be considered denied.
4. There was no abuse of discretion in annexing such a condition to the order, where the moving party had ample time and means to comply with its terms.

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Dismissed.*

For the appellant there was a brief by *James F. Dougherty* and *Edward H. Ryan,* and oral argument by *Mr. Ryan.* Among other references they cited *Cleveland v. Hopkins,* 55 Wis. 387, 13 N. W. 225; *Johnson v. Eldred,* 13 Wis. 482; *Jones v. Walker,* 22 Wis. 220; *Smith v. Barron Co.* 44 Wis.

686; *Union Nat. Bank v. Benjamin,* 61 Wis. 512, 21 N. W. 523; *Butler v. Mitchell,* 17 Wis. 52; *Behl v. Schuette,* 95 Wis. 441, 70 N. W. 559; *Morgan v. Bishop,* 61 Wis. 407, 21 N. W. 263.

For the respondent there was a brief by *N. E. Van Dyke,* attorney, and *Grotophorst, Evans & Thomas,* of counsel, and oral argument by *E. A. Evans.* They cited, besides other cases, *Tenney v. Madison,* 99 Wis. 539, 75 N. W. 979; *Glover v. Wells & M. G. Co.* 93 Wis. 13, 66 N. W. 799; *Central Nat. Bank v. Brand,* 100 Wis. 648, 76 N. W. 608.

TIMLIN, J. The sixty days within which a proposed bill of exceptions should be served (sec. 2876, Stats. 1898) having expired, the appellant applied to the circuit court for an order extending the time. The court on July 25, 1910, granted the motion, but upon condition that "the defendant stipulate that the cause be placed upon the August, 1910, term of the supreme court for the state of Wisconsin upon motion as by the supreme court rules provided, and that they will, within ten days from the service of this order, perfect their said appeal." There was also a provision to carry those conditions into effect and an imposition of ten dollars costs. This appeal is from that part of the order imposing conditions.

Sec. 2831, Stats. (1898), gives the circuit court power, "on motion and good cause shown, in discretion and upon such terms as may be just, [to] allow any such proceeding to be taken after the time limited by or in pursuance of the statute." Respondent first contends that the order is not appealable. Subd. 2 of sec. 3069, Stats. (1898), authorizes an appeal from a "final order affecting a substantial right made . . . upon a summary application in an action after judgment." There is no question but that this was a final order made upon a summary application in an action after judgment. But it is contended that the order does not affect a substantial right and therefore is not appealable.

It has long been a rule of practice in this court that upon appeal from discretionary orders, if the discretion of the court below has been abused, the order will be reversed, but if it is found that the discretion has not been abused the appeal will be dismissed. *McCarville v. Boyle,* 89 Wis. 651, 62 N. W. 517; *McElroy v. Minnesota P. H. Co.* 109 Wis. 116, 85 N. W. 119; *Lessig v. Lessig,* 136 Wis. 403, 117 N. W. 792. In the interest of uniformity this rule should be applied to an appeal of the kind in question here, and in that sense the order is appealable. *Ray v. Hixon,* 90 Wis. 39, 62 N. W. 922; *Evans v. St. Paul F. & M. Ins. Co.* 54 Wis. 522, 11 N. W. 556; *McElroy v. Minnesota P. H. Co., supra.* The language used in *Hatch v. Kurtzweil,* 112 Wis. 231, 87 N. W. 1082, and *Wood v. Blythe,* 42 Wis. 300, stating generally that orders of this kind are not appealable, is too broad and should be restrained.

The conditions annexed by the court below to the order in this case were within the power of that court and not unduly onerous. The appellant at the date of the order had the official stenographer's transcript of the testimony. The additional labor required for compilation of the bill of exceptions was not great. The appellant had ample means and could have complied with the terms imposed, and its refusal to do so was without reasonable or just excuse. We find no abuse of discretion in annexing the condition complained of to the order in question, and therefore dismiss the appeal.

By the Court.—Appeal dismissed.

BAUMANN, Respondent, vs. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

November 18—December 6, 1910.

Life insurance: Forfeiture: Nonpayment of premium: Tender: Estoppel: Cancellation of policy: Notice.

1. In an action on a life insurance policy which had been canceled on the books of the company for nonpayment of a premium, the evidence is *held* to support a verdict finding, in effect, that plaintiff went to an agent of the company authorized to deal with her on the subject, that she offered to pay him the premium in question before it became due, and that she was deterred from making such payment by conduct or statements on the part of such agent which induced in her an honest belief that a failure to then make the payment or tender would not be relied upon by the company to work a forfeiture of the policy; and upon such facts plaintiff is entitled to recover.
2. After the policy in such a case had been canceled by the company and plaintiff had knowledge thereof, no duty devolved upon her to tender subsequent premiums.
3. It is immaterial in such a case that the company did not properly or credibly inform plaintiff of the cancellation: it is enough that the information came to her and was true.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action upon a life insurance policy which contained the following conditions:

"Premiums are payable at the home office in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt signed by the secretary and countersigned by the person receiving the payments."

"The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified nor any forfeiture waived or premiums in arrears received except

by agreement in writing signed by either the president, vice-president, secretary or actuary, whose authority for this purpose will not be delegated. No other person has or will be given authority."

Other facts are stated in the opinion. The jury returned a general verdict for plaintiff, and from a judgment entered thereon the defendant appealed.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* counsel, and oral argument by *Jackson B. Kemper.* They cited *Gish v. Ins. Co. of N. A.* 16 Okl. 59, 87 Pac. 869, 13 L. R. A. N. S. 826, note; *Carey v. German Am. Ins. Co.* 84 Wis. 80; *Hankins v. Rockford Ins. Co.* 70 Wis. 1; *McElroy v. Metropolitan L. Ins. Co.* 84 Neb. 866, 122 N. W. 27; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 22 Sup. Ct. 133; *Manhattan L. Ins. Co. v. LePert,* 52 Tex. 504.

For the respondent there was a brief by *Fish & Storms,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *T. W. Spence.* They cited *Merrick v. N. W. Nat. L. Ins. Co.* 124 Wis. 221, 226; 28 Am. & Eng. Ency. of Law (2d ed.) 36, and cases cited; *Slesinger v. Bresler,* 110 Mich. 198, 68 N. W. 128; *Barnett v. Gluting,* 3 Ind. App. 415, 29 N. E. 927; *Hansen v. F. & P. M. R. Co.* 73 Wis. 346; *Knoebel v. North Am. Acc. Ins. Co.* 135 Wis. 424, 428; *Seidel v. Equitable L. Assur. Soc.* 138 Wis. 66, 119 N. W. 818, 820; *Guetzkow v. Michigan Mut. L. Ins. Co.* 105 Wis. 448, 451, 81 N. W. 652.

VINJE, J. The only error relied upon is that there were no facts proven to sustain a judgment in favor of plaintiff.

There is evidence to sustain a finding of these facts: The policy was issued October 13, 1904, on the life of plaintiff's husband, and the first semi-annual premium was paid. The second semi-annual premium became due April 13, 1905. A short time prior thereto the plaintiff went to the office of the

company and offered to pay the premium, saying that she had already paid it to a man she supposed to be the company's agent, but had not received a receipt, and that she was ready and willing to pay it again. The office she went to was that of the district superintendent of the company, located in the Wolff Building, in Racine, and had the name *Metropolitan Life Insurance Company* on the door. This office was occupied by the district superintendent, Mr. John B. Comer, and the assistant superintendent. They had authority to receive, and receipt for, premiums. Plaintiff was unable to identify the man with whom she talked. She was told not to pay the premium then; that they would look the matter up and notify her. About the time the premium became due she went to the same office again and told the man that she would like to pay the premium over again, for the agent had taken her money and had not given her a receipt for it. He thereupon told her he was not allowed to take it, but would notify the company and let her know about it. A week or so later she spoke to other agents of the company, Fritz and Redfield, at her house. The latter came every month to collect premiums on an industrial policy she held in the same company. He told her he could not receive the premium, but would look it up and attend to it. She spoke to him right along about the matter and he gave her the same answer, and at last said he could not take the money because he thought the policy had lapsed. On May 22, 1905, the policy was canceled on the books of the company for nonpayment of premium. The insured died August 16, 1908.

The trial court instructed the jury as follows:

"In order that she may recover in this action, the plaintiff must satisfy you, by the preponderance of the credible evidence, that she went to the defendant's authorized agent prepared to pay the premium in question, made known her desire to pay the same to such agent, and was only prevented or deterred from making such payment, or making lawful tender, by conduct or statements on the part of such agent which rea-

sonably led her, the plaintiff, to honestly believe that failure to make such payment or such tender at such time would not be relied upon by the defendant to work a forfeiture of the policy, and that she relied upon such conduct or representation, and therefore did not make a payment or tender of the premium at that time."

In returning a verdict in favor of plaintiff under this charge and the evidence, the jury in effect found that plaintiff went to an agent of the defendant authorized to deal with her on the subject; that she offered to pay him the premium before it became due; that she was deterred from making such payment by conduct or statements on the part of such agent which induced in her an honest belief that a failure to then make the payment or tender would not be relied upon by the company to work a forfeiture of the policy. We cannot say that such a finding rests upon evidence so unsatisfactory that this court can set it aside. It is true there is a conflict in the evidence, but the jury resolved such conflict in favor of the plaintiff, and we cannot disturb the result they reached. The conflict consisted mainly in the denial by the superintendent, Comer, that he had ever had such conversations with plaintiff as she testified were had by her with some one in his office, and in the testimony of the agent Redfield that he had called upon her at her house to collect the premium, but that she refused to pay it, and also in the testimony of an agent, Geise, who said that she had told him her husband had canceled the policy.

It is urged that the plaintiff was not credibly informed that the policy had been canceled by the company. It is an admitted fact, however, that the company did cancel the policy on the 22d of May, 1905, for nonpayment of premium, and it cannot now be heard to say that it did not properly or credibly inform her of the fact. The information did come to her, and it was true. That is enough. After the policy was canceled and the plaintiff had knowledge thereof, no duty de-

volved upon her to tender subsequent premiums. *Guetzkow v. Michigan Mut. L. Ins. Co.* 105 Wis. 448, 81 N. W. 652; *Langnecker v. Trustees A. O. U. W.* 111 Wis. 279, 87 N. W. 293; *Wuerfler v. Trustees W. O. D.* 116 Wis. 19, 92 N. W. 433; *J. I. Case T. M. Co. v. Johnson,* 140 Wis. 534, 122 N. W. 1037.

Plaintiff remitted from the verdict the amount of the unpaid premiums from April, 1905, to the date of death of insured, with six per cent. interest from the time each became due according to the terms of the policy.

By the Court.—Judgment affirmed.

TIMLIN, J., dissents.

NEACY, Appellant, vs. BOARD OF SUPERVISORS OF MILWAUKEE COUNTY and others, Respondents.

November 18—December 6, 1910.

Statutes: Construction: Counties: Relocation of house of correction: Acquiring land by purchase: Rescission: Taxpayer's action: Fraud of public officers: Degree of proof: Appeal: Findings of fact: Duties of trial judge.

1. Where language in a statute, taken literally, is meaningless, but the legislative intent is manifest from the context or history of the enactment, words may be transposed, stricken out, or interpolated, or may be given a very restrictive or a very broad meaning, in aid of judicial construction, for the purpose of giving effect to such manifest intent.
2. Thus, by transposition and addition of words, ch. 356, Laws of 1903, is construed to read as follows: "In any county in this state which now maintains or shall hereafter maintain, or shall desire to establish or relocate and maintain, under any law of the state of Wisconsin, a house of correction . . . whenever it shall so determine the county board of such county may provide for acquiring and may acquire . . . all necessary land

upon which to locate, relocate and maintain such house of correction," etc.

3. In an action by a taxpayer to rescind a transaction whereby a county has acquired title to lands for a public purpose, the basis of the action being alleged fraud of public officers involving moral turpitude or the commission of a criminal offense, such fraud must be established by clear and satisfactory evidence, as distinguished from a mere preponderance of the evidence.

4. Findings of the trial court in such a case negativing the alleged fraud will not be disturbed on appeal unless palpably unsupported by evidence and having no reasonably fair basis in the record.

5. The power of eminent domain need not be exercised where a municipality and a person whose land is desired for public use agree upon the amount to be paid therefor; and such agreement may properly be reached through the aid of appraisers whose valuation of the land is not to be binding upon either party but to be treated as advisory only.

6. MARSHALL, J., speaking independently, suggests a stricter compliance by trial judges with the statute (sec. 2863, Stats. 1898) relating to findings of fact and conclusions of law.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Taxpayer's action to secure a rescission, on the ground of fraud, of a transaction whereby the county of *Milwaukee* acquired title to certain lands for public purposes; a cancellation of conveyance made to the county in respect to the matter; an injunction against making any payment for the property; and recovery into the county treasury of any money paid.

The issues joined by the complaint and various answers thereto, were closed by findings, a summary of which will show with sufficient clearness, for the purposes of the appeal, the nature of the case, evidence adduced by the respective parties, and the result. The following is such summary, omitting such matters as merely go to the capacity of plaintiff to bring the action and the necessity or propriety of making the several persons named as defendants parties to the litigation:

1. The board of supervisors of *Milwaukee* county having duly decided to purchase land for location of a house of correction, pursuant to their resolution, advertised for proposals from landowners,—having suitable premises for such purpose, one essential being a stone quarry on the lot,—to sell the same to the county, each proposal to have certain prescribed incidents.

2. Several proposals were received and among them one from *Johanna Zautcke* and other defendants, constituting the *Zautcke* heirs, to sell a tract described in the complaint, consisting of 210.20 acres for $115,000, and one from defendant *Conrad K. Reichert* to sell for $48,000 an eighty-acre tract described in the complaint.

3. All offers were submitted January 29, 1907.

4. Upon consideration of the matter the board chose such two tracts, the price to be fixed by an arbitration committee, made up of three members of the board, appointed by the chairman, three persons appointed by the owners of the lands, and one person appointed by the six.

5. The plan to so fix the price originated with one of the landowners and was presented by a member of the board.

6. A committee was appointed accordingly, which subsequently reported the value of the Zautcke tract of 208.27 acres at $117,216 and of the Reichert tract of 76.40 acres at $47,320, based, among other things, upon information as to recent sales of near-by property, including one in the fall of 1906 at $1,200 per acre and one in the spring of such year at $1,000 per acre, both parcels having railroad frontage, and sales of some adjacent lots. The committee further reported that the appraisal was at the market price without reference to any element respecting the stone quarry or advantage obtainable by selling the land in parcels, which it was suggested would be considerable.

7. The day of the report *Reichert* offered to sell his land to the county at the appraised value on terms of payment specified.

8. Thereupon the board resolved, reciting the facts aforesaid, to accept the report and to purchase the two tracts of land at the appraised values and to issue county orders accordingly, upon the title being approved by the district attorney and proper conveyances being made and delivered.

9. The report was incorrect, in that the land said to have been sold for $1,200 per acre was in fact sold for $1,000 per acre, and a trifle over one acre of that said to have been sold for $1,100 per acre was in fact sold for $300 per acre, conditioned upon the purchaser putting up a factory and employing therein 500 men and obtaining an option to buy eleven acres more at a price to be fixed on a sliding scale of $1,100 to $100 per acre according to the number of men employed at the factory. The truth of the matters misrepresented could have been largely obtained from public records and wholly by diligent inquiry. The committee based the misstatements on reports to them which they believed to be true.

10. The idea of those who voted for the arbitration committee was to thereby reduce the asking price for the lands. The report was not, in general, considered as binding on the board, and while the members believed it to be true, they were personally familiar with the value of the lands and, in the end, acted upon such knowledge, so the result would not have been different had they known the exact facts in regard to the two sales.

11. The reasonable value of the lands, exclusive of the stone quarry feature, does not exceed $400 per acre. Such feature is of no commercial value for an operating business. Its value to the county is dependable upon utilizing convict labor successfully.

12. The average purchase price of the two tracts of land is $570 per acre.

13. The determination of the purchase price was not characterized by fraud.

14. After conclusion, as aforesaid, of the negotiations to purchase the lands in due course the district attorney of the

county approved the titles and proposed conveyances, and such conveyances with approved abstracts were duly tendered to the county and county orders for the purchase price demanded. The demand in each case was refused.

15. The refusal was predicated upon pendency of this action, and advice of the district attorney that consummation of the purchase should await termination of the litigation.

16. The members of the arbitration committee were not pecuniarily interested in the purchase and those uniting in the report acted in good faith, according to their best judgment.

17. The county board with all matters aforesaid before it and stated in the complaint ratified the agreement to purchase.

18. Neither of the persons interested in the lands nor any defendant was guilty of deceit or exercising undue influence with the board or any member thereof.

Upon the facts aforesaid the court decided that the county board had authority to make the contracts; that they were free from taint of fraud, were binding on the county, and that judgment was due defendants dismissing the complaint with costs. Judgment was rendered accordingly.

For the appellant there was a brief by *Harper & McMynn,* and oral argument by *R. N. McMynn.*

For the county of *Milwaukee* there was a brief by *Chas. A. A. McGee,* district attorney, and *Norman L. Baker,* assistant district attorney.

For the respondents the *Zautcke* heirs there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *J. L. O'Connor* and *Robert Wild.*

For the respondent *C. K. Reichert* there was a brief by *John F. La Boule* and *Adolph Huebschmann,* and oral argument by *Mr. Huebschmann.*

MARSHALL, J. The court has considered with care the various errors assigned and the result will be stated briefly.

The nature of the questions raised is such as to render extended discussion unnecessary.

The first matter presented is whether the county possessed power to purchase the real estate and relocate its house of correction. That is referable to ch. 356, Laws of 1903. The trial court found authority conferred thereby, reaching that conclusion by judicial construction which counsel for appellant contend is wrong.

We start with the concession by appellant's counsel, concurred in by respondents' counsel, that if the chapter referred to, properly construed, empowers a county, after having once located a house of correction, to purchase land for a relocation thereof, then power existed in the circumstances of this case, otherwise not.

Notwithstanding the laborious argument of counsel respecting the meaning of the law of 1903, in our judgment, it is quite plain and can easily be read from the language used notwithstanding the senseless nature thereof, taken literally. The law is a striking illustration of the careless legislation courts have to deal with. If it were not for the instrumentalities, called rules for construction, which enable courts to get sense out of an enactment, if any was put there by the lawmakers and not hidden so as to be undiscoverable, much written law would be found on our statute books which could not be given the legislative purpose, and some which could not be given any effect at all.

The difficulty here grows out of these words in the law of 1903:

"Whenever in any county in this state, which now maintains or shall hereafter maintain, under any law of the state of Wisconsin, or which shall desire to establish, or relocate and maintain a house of correction by whatsoever name known or called, for the detention of any person or persons who may be lawfully confined therein, the county board of such county may provide by resolution for acquiring, and may acquire, take and hold, by purchase or condemnation for, and in the name

of such county, all necessary land upon which to locate, relocate and maintain such house of correction; . . . and whenever the county board of any county now maintaining a house of correction . . . shall have decided to change the location of its said house of correction as is hereby authorized and shall for such purpose have acquired land," etc.

It will be seen, at a glance, that the opening lines quoted, which evidently were designed to state the situation to which the power, granted by the language commencing with the words "the county board of such county may provide," refers,—are incomplete. They do not, unaided by construction, make any basis for what follows. When did the legislature intend that such power might be exercised? That it was intended to include such a situation as existed in this case is put beyond room for reasonable controversy by these words, following the words of grant: "and whenever the county board of any county now maintaining a house of correction . . . shall have decided to change the location . . . as is hereby authorized," suggesting clearly such previous authorization to have been included in the language going before. Thus, in the last clause of the quoted language, we have the clearest of legislative recognitions of its having granted in a preceding clause the power to relocate a previously established house of correction. Such being the case, by necessary implication, words were inadvertently omitted from or added to the previous clauses, or words were transposed, rendering the legislative purpose, looking to such clauses alone, obscure. It follows that words necessary to be supplied should be deemed to be in place by necessary or reasonable implication, and words necessary to be displaced, so far as evidently inadvertently used,—to bring out the sense manifestly intended should be regarded as surplusage,—and words necessary to be transposed to that end should be given their proper place, all by familiar rules for judicial construction.

Many examples of interpolation and rejection and transposition of words to render a legislative enactment capable of

being given a sensible effect in accordance with the purpose of the lawmakers, are given in Endlich on Construction of Statutes at §§ 298 to 305, inclusive, and §§ 317 to 319, inclusive.

The author cited says, referring to authority:

"A mistake apparent on the face of an act, which may be corrected by other language of the act, is never fatal. In all such cases, it may, with propriety, be said that the context rectifies the error, and it is not the court that assumes to correct the legislature. . . . The judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention, and that his amendment probably does." [Sec. 319, p. 437.]

The stated doctrine has been often applied by this court to the extent of transposing, striking out, interpolating, and giving words a very restrictive or very broad meaning to carry out a manifest intent, or to avoid a very unreasonable or absurd result; one that could not reasonably have been intended, or to turn the literal sense, which is expressionless, into sensible, reasonable meaning. The following are good illustrations: *Att'y Gen. v. West Wis. R. Co.* 36 Wis. 466, "or" eliminated and "and" substituted; *Palms v. Shawano Co.* 61 Wis. 211, 21 N. W. 77, words regarded as surplusage and correct words substituted for those wrongly used; *Custin v. Viroqua,* 67 Wis. 314, 30 N. W. 515, omission in a recital supplied; *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544, "state prison" construed to mean the place commonly known by that name, or any other place in the state for similar use by whatever name known; *State ex rel. McGrael v. Phelps, ante,* p. 1, 128 N. W. 1041, modifying phrases interpolated.

The citations from our own reports are ample, but this field of construction has become so important in recent years by

reason of the many legislative crudities with which we have had to deal, that it may be well to indicate by the general trend of authority that the application of rules for construction here has been none too radical.

It is to be borne in mind that judicial rules are never to be applied to put a meaning into an enactment, but to get the intended meaning out of it; never to vary the intended meaning in any way, but to go to the uttermost boundaries of reason to read from that which the legislative department has placed before the public the purpose thereof, and to do that without violation of rules of language or of law.

Here are a few of the many foreign illustrations of the foregoing, which are at hand: *Kennedy v. Gibson,* 8 Wall. 498: an act, in terms, authorizing suits "against" an association to be brought in a particular jurisdiction, construed as authorizing suits in such jurisdiction to be brought by or against, the words "by or" being interpolated. In *State v. Lee,* 37 Iowa, 402, the words "or both such fine and imprisonment at the discretion of the court," eliminated by construction. In *Lyde v. Barnard,* 1 M. & W. 101, 115, the word "upon" eliminated. In *Waters v. Campbell,* 4 Sawy. 121, a clause in the statute read as if followed immediately by a provision found in preceding lines without immediate connection. In *State ex rel. County Comm'rs v. Zanesville & M. T. R. Co.* 16 Ohio St. 308, a clause included in the second section of an act, read as if included in the first, qualifying the provisions of the latter.

Applying the foregoing to the act before us, the error in the first clause is corrected materially by the last clause, showing that the preceding, in part, related to the purchase of lands for the relocation of a house of correction. The collection of words carelessly used to express such purpose is rendered clear in literal sense, in harmony with the manifest intent, by transposing from their legislative location the words "under any law of the state of Wisconsin," to a place after the words "or

relocate and maintain," and expanding the word "whenever" so as to express with its appropriate context the idea intended and fairly suggested, by adding thereto the words, "it shall so determine," or similar words, and placing the whole as a qualifying clause after the word "therein." The result is this: "In any county in this state, which now maintains or shall hereafter maintain, or which shall desire to establish or relocate and maintain, under any law of the state of Wisconsin, a house of correction . . . whenever it shall so determine, the county board of such county may provide for acquiring and may acquire . . . all necessary land upon which to locate, relocate and maintain such house of correction," etc.

An examination of the original bill shows that the words thus efficiently transposed, in the law of 1903, were misplaced by carelessness at the start, and that they persisted to the end, notwithstanding the bill took all the ordinary steps in its course to lodgment in the office of the secretary of state as a completed enactment, including consideration by three committees. However, the real meaning is made very plain, as we have seen.

The various errors assigned respecting whether the findings are against the clear preponderance of the evidence, we will dispose of without extended discussion of exceptions in detail. On this branch of the case we bear in mind that appellant's case is based on fraud, requiring the facts in that regard to be established by clear and satisfactory evidence; a higher degree than is necessary in ordinary civil cases.

True, as has been suggested upon previous occasions, the distinction between establishment of a fact by a preponderance of the evidence to a reasonable certainty, and establishment thereof to such certainty by clear and satisfactory evidence, may be somewhat shadowy; but it is considered that there is such a distinction which is so substantial that a definite rule in respect thereto was logically formulated at an early day and has become a significant feature of our judicial

system. Such feature must, necessarily, vary in importance according to the depth of moral turpitude of the fraud alleged. When such turpitude involves the question of whether several public officers are guilty of having abused their public trusts to an extent rendering them proper subjects for prosecution and punishment as criminals, it has importance not much less than the degree of certainty requisite to a conviction in a criminal case, though, of course, yet substantially less. It was once held not even such degree (*Freeman v. Freeman,* 31 Wis. 235), but later that was modified, as stated in *Poertner v. Poertner,* 66 Wis. 644, 29 N. W. 386; *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140.

In the latter case the court said:

"The presumption of innocence and fair dealing among men is so persuasive that a situation which violates it calls for evidence of a more clear and satisfactory character than one that does not involve moral turpitude or the commission of a criminal offense. Consistent with that idea, the rule is well recognized that where fraud, whether constituting a criminal offense or not, is alleged as the foundation of the action, but especially in case of the former, it must be established by clear and satisfactory evidence or there can be no recovery. The more serious the nature of the fraud charged, the more rigidly should that rule be applied."

In view of the foregoing and the respect which otherwise must be given to the decision of the trial court as to issues of fact, the findings complained of cannot be disturbed unless they appear so palpably unsupported by evidence as to lead to the conviction that they do not evidence the elements of judicial consideration and judgment which should be devoted to such matters; that from bias or inadvertent or other omission to properly heed plain evidence, or heed it at all, conclusions were reached having no reasonably fair basis in the record. Such degree of clearness of error in a case of this sort, is necessary in order to respond to the call for a clear preponderance of evidence; giving due weight to those elements com-

monly presumed in such situations to have been probably helpful in aiding the trial court to arrive at his conclusions, and which we cannot have the benefit of. The importance of the latter element as a counter weight to appearances from the printed record only, of error as to matters of fact, has often been referred to. *Hill v. American S. Co.* 112 Wis. 627, 88 N. W. 642; *McGarry v. Runkel,* 118 Wis. 1, 94 N. W. 662; *Harrigan v. Gilchrist,* 121 Wis. 127, 312, 314, 99 N. W. 909; *Rankl v. Schmidt,* 133 Wis. 103, 113 N. W. 423; *Litts v. Goss,* 135 Wis. 405, 115 N. W. 1091.

Without further discussion of this branch of the case or referring in detail to evidence to justify our conclusions, we will close it by merely stating that we come quite short of discovering error in the trial court's conclusions of fact with the clearness requisite to efficiently overturn them in any material degree.

It has been suggested that the purchase price of the property was arrived at in an illegal manner; that in case of inability of a municipality and a person whose property is desired for public use, as in this case, to agree upon the compensation to be rendered therefor, the power of eminent domain is to be exercised to that end, as provided in sec. 694*c*, Stats. (1898). The infirmity in that position is based on false premises. The essential of inability to agree did not exist in this case. The proceedings for an appraisement were not resorted to for the purpose of compelling the landowners to part with their property at a price not satisfactory to them, but for the purpose of arriving at an agreement as to price, rendering compulsory proceedings unnecessary. The result of the appraisement was not binding on either party and was not considered as binding. It was only treated as advisory,—a mere aid in reaching an agreement. The result was in the nature of an offer on one side and an acceptance on the other, thus arriving at an agreed price.

It is not thought best to say more in deciding the appeal.

An opinion of great length might easily be written by taking up, in detail, the multitude of matters, mostly those of fact, included in the printed record of 500 pages of case and 300 of arguments. It would serve no purpose except to satisfy counsel, if that were necessary, that the subjects so laboriously presented have all challenged attention. They must be satisfied with the court's assurance in that regard.

By the Court.—Judgment affirmed.

The following opinion was filed December 15, 1910:

MARSHALL, J. (*speaking independently*). A few observations seems to me to be appropriate respecting the general character of the findings. The remarks in respect thereto are to be considered largely matter of personal judicial suggestion for the better observance of the statutory duty created by the written law, sec. 2863, Stats. (1898), providing that, in a case of this sort, the trial "judge shall state in his decision separately: 1. The facts found by him; and 2. His conclusions of law thereon." Few statutes, if any, can be found so concise and plain as that. There is no statute respecting the practice, strict compliance with which would be more conducive to good, speedy, and certain administration of justice, yet no statute so frequently violated in letter or spirit, or both. The most frequent violations are by general findings, not responsive at all to the command of the law, that the judge shall state "separately" the facts found by him. Such infirmity leaves this court to perform the arduous labor of searching through a long, complicated record to find out just what precise matters of facts were definitely passed upon. That species of findings has been said not to arise to the dignity of an attempt to comply with the statute, and to not be entitled to consideration within the rule that findings of fact will not be disturbed on appeal unless against the clear preponderance of the evidence. The abuse in that field has been so per-

sistent, notwithstanding frequent suggestions that the making of such findings constitutes error which should not be indulged in merely because of the rule applicable to the generality of cases that it may not be deemed fatally harmful, that it has seemed necessary (*Damman v. Damman,* 145 Wis. 122, 128 N. W. 1062) to indicate that such abuse may be fatal to the result.

In my judgment the common departure referred to is not more harmful than that of putting upon counsel the duty of drafting findings to be signed, which, generally, in my judgment, results in very different findings, in form and sometimes in fact, than would otherwise be filed. Such partisanly prepared findings, however conscientiously drawn, are likely to be so general as not to disclose with a reasonable degree of definiteness the issues passed upon, or to be so argumentative and amplified by mere evidentiary matters, or otherwise, as to double or treble, or more, the work sufficient to enable one here to comprehend the precise method by which the final result was reached.

In this case the findings were composed of some over 5,000 words. To facilitate study thereof the writer reduced them to about eight folios. I may well assume it would have been easier for a person so thoroughly possessed of the case as to satisfactorily decide it, to draft concise findings, than study with sufficient care to be able to judicially comprehend such a draft as was presented for approval. The work of drafting such findings as the statute calls for, with the aid of a good stenographer, when the case is ripe for decision, is such that, as a rule, the labor of the trial judge is increased rather than diminished by leaving the work to the attorneys, resulting as it did in this case.

The foregoing must be understood as written to suggest methods, from experience of the writer, how the work performed by many hardworked circuit judges may be lessened rather than increased, and how much expense, delay, and un-

certainty in the administration of justice may be saved. In this case the learned circuit judge at great labor wrote and promulgated an opinion which the law does not require, expending in preparation thereof several times the work needed to prepare the concise findings which the law does require, and then was compelled to study somewhat partisan findings, drafted by judicial request, composed of thousands of words, devoting work thereto, in order to intelligently sign them, largely in excess of that needed to draft concise findings, composed of the few hundred needed words.

It is painful to the writer to see so much burdensome work needlessly done because of not more directly complying with the statute. I make this statement fully so that the overworked judge may not regard a suggestion which is intended to be helpful to him in his administration and show a way of lightening his burden; as one which, if followed, would increase his labor.

SENTINEL COMPANY, Respondent, vs. A. D. MEISELBACH MOTOR WAGON COMPANY, Appellant.

November 19—December 6, 1910.

Corporations: When existence begins: Power to contract: Authority of incorporator: Evidence: Sunday: Judicial notice: Recovery for advertising in Sunday paper.

1. Under our statutes a corporation comes into being on the filing of its articles with the register of deeds, and from that time may bind itself by contract; and the signers of the articles have authority to manage its affairs.
2. Evidence showing, among other things, that immediately after the filing of articles of incorporation with the register of deeds one of the signers assumed the management of the affairs of the corporation and held himself out as acting for it and contracted on its behalf the indebtedness in question for engravings and advertising, and that very soon afterwards, with the knowledge and consent of the other signers, he acted as secretary and manager of the sales department on a salary, made

contracts for the corporation, and represented it in the management of its business, was sufficient to sustain a verdict to the effect that he was authorized to bind the corporation by said contract.

3. In an action on *quantum meruit* to recover for newspaper advertising, the dates of publication appearing from the evidence, the court was bound to take judicial notice that certain of the advertisements were published on Sunday.

4. Under sec. 4595, Stats. (1898), prohibiting any kind of labor, business, or work on Sunday, except only works of necessity and charity, there can be no recovery on *quantum meruit* for advertisements published in a newspaper on Sunday,—at least unless they are shown to be within the exception.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Modified and affirmed.*

This action was brought on *quantum meruit* to recover upon two causes of action. The first cause of action was for advertising done for the defendant by the plaintiff between the 1st day of January and August, 1906, alleged to be reasonably worth $248.67. An exhibit is attached to the complaint showing the items and dates of publication. The second cause of action is based upon a claim for the manufacture and delivery to the defendant, at its special instance and request, by the Clark Engraving & Printing Company, a corporation, of engravings, plates, cuts, and drawings alleged to be reasonably worth $60.10, which it is alleged the defendant agreed to pay for, and that the claim of said Clark Engraving & Printing Company was assigned to the plaintiff prior to the commencement of this action. The exhibit attached to the complaint under the first cause of action is as follows:

A. D. Meiselbach Motor Wagon Company,
In account with *Sentinel Company,* Dr.

1906.			
May	13.	To advertising	$32 34
	20.	" "	40 18
	27.	" "	33 32
	28.	" "	57
	31.	" "	78 10
June	30.	" "	64 16
			$248 67

The date of the last item, June 30, was corrected on the trial without objection to read June 3.

The complaint also alleges that the defendant is a corporation. The answer denies the corporate existence of the defendant, and denies generally the allegations of the complaint. It was, however, admitted on the trial that the Clark Engraving & Printing Company was a corporation at the times stated in the complaint, and that the work alleged to have been performed by said company was in fact performed and the prices charged therefor reasonable. The material controverted issues upon the trial briefly stated were: (1) The incorporation of the defendant at the time in question, and its power to incur the obligation; (2) the authority of one Charles Rohde to bind the defendant, and whether said Rohde individually, or the defendant through him, authorized the advertisements published by the plaintiff and the work done by the Clark Engraving & Printing Company; (3) whether the defendant ever adopted the acts of Rohde in the matters in question; (4) the validity of the Sentinel Sunday advertising as a basis for legal liability against the defendant; and (5) the reasonable value of the Sentinel advertising.

The jury returned a general verdict in favor of the plaintiff upon both causes of action for the sum of $308.77, with interest from the 30th day of June, 1906. The defendant moved that the verdict be set aside and for judgment dismissing the complaint with costs, and in case of the denial of such motion that the verdict be set aside and a new trial granted for several alleged reasons. Defendant's motions were denied and judgment ordered for the plaintiff in accordance with the verdict, from which the defendant appealed.

For the appellant there was a brief by *Perry, Morton & Kroesing,* and oral argument by *George E. Morton.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

KERWIN, J. The first three propositions referred to in the statement of facts, namely, the power of the defendant to incur the obligation which is the basis of plaintiff's claim, the authority of Rohde to bind the defendant and whether he in fact did so, and whether defendant adopted the acts of Rohde, may be considered together. The articles of incorporation of the defendant were filed with the register of deeds on May 8, 1906. They were signed by A. D. Meiselbach, B. R. Godfrey, and Chas. Rohde, incorporators. Sec. 1772, Stats. (1898), provides for the filing of the articles of incorporation or a true copy thereof with the secretary of state and register of deeds of the county in which the corporation is located, and further provides that "no corporation shall, until such articles be so left for record, have legal existence." Sec. 1773 provides that "until the directors or trustees shall be elected the signers of the articles of organization shall have direction of the affairs of the corporation," and that "no such corporation shall transact business with any others than its members until at least one half of its capital stock shall have been duly subscribed and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof the corporation offending shall have no right of action thereon; but the signer or signers of the articles and the subscriber or subscribers for stock transacting such business or authorizing the same, or having knowledge thereof, consenting to the incurring of any debt or liability, as well as the stockholders then existing, shall be personally liable upon the same."

Under our statutes the defendant became a corporation at the time of the filing of its articles with the register of deeds, namely, May 8, 1906, and was capable from that time to bind itself by contract, and the signers of the articles had lawful authority to manage its affairs. *Badger P. Co. v. Rose,* 95 Wis. 145, 70 N. W. 302. There is evidence tending to show that, immediately after the articles of incorporation of the de-

fendant were filed with the register of deeds, Chas. Rohde, one of the signers, assumed the management of the business and contracted the indebtedness in question on behalf of the corporation and held himself out as acting for the corporation. There is also evidence that early in May, 1906, Rohde, with the knowledge and consent of the other signers of the articles, acted as secretary and manager of the sales department of the defendant at a salary of $1,200 per year, made contracts for the defendant, and represented it in the management of the business. The jury in finding for the plaintiff necessarily found the facts in its favor, and, without further reciting the evidence, it is sufficient to say that there is ample evidence to support the verdict on the points of Rohde's authority to bind the defendant and that he did in fact contract with the plaintiff and the Clark Engraving & Printing Company on defendant's behalf. All the services performed by the plaintiff and the Clark Engraving & Printing Company and material furnished were done, performed, and furnished for defendant after the filing of the articles of incorporation of the defendant, therefore after the defendant had existence as a corporation.

The only serious question on this appeal is the right of the plaintiff to recover for charges made for Sunday publications. It appears from the record that four of the items recovered for, namely, May 13, $32.34; May 20, $40.18; May 27, $33.32; and June 3, $64.10, were for Sunday publications, and the question arises whether the recovery for these items can be sustained. The main answer of respondent's counsel to the contention of appellant's counsel on this point is that the objection to these items as being Sunday publications was not sufficiently brought to the attention of the trial court, the only objection made to proof of these items being that the evidence was incompetent, irrelevant, and immaterial, while on the part of appellant it is contended that, the dates appearing, the court was bound to take judicial notice that such pub-

lications were on Sunday. The action being on *quantum meruit* to recover what the publication of the articles was reasonably worth, and the dates of publication appearing, we think the court was bound to take judicial notice of the Sunday publications and that no recovery could be had therefor. *McIntosh v. Lee,* 57 Iowa, 356, 10 N. W. 895; *Wilson v. VanLeer,* 127 Pa. St. 371, 17 Atl. 1097; *Louisville & N. R. Co. v. Brinkerhoff,* 119 Ala. 606, 24 South. 892; 1 Ency. of Ev. 768. Moreover, it appears from the record that at least three of the Sunday publications were brought to the attention of the court as Sunday publications. The question is not free from difficulty. It is a matter of common knowledge that Sunday newspapers are published throughout the country and that they contain in their columns much valuable advertising matter, and it seems like a harsh rule to hold that such publications made on Sunday cannot be recovered for, although perhaps much of the work in preparing the matter for publication is done on secular days. However in the case before us we are not dealing with a situation of agreement made on a secular day for work to be done generally, nor a case of agreement made on Sunday for work afterwards done on a secular day and supported by a subsequent promise, under the rule laid down in *Melchoir v. McCarty,* 31 Wis. 252; *Williams v. Lane,* 87 Wis. 152, 158, 58 N. W. 77; *Schmidt v. Thomas,* 75 Wis. 529, 44 N. W. 771; *King v. Graef,* 136 Wis. 548, 117 N. W. 1058; and *Vinz v. Beatty,* 61 Wis. 645, 21 N. W. 787. In the case at bar the respondent placed itself squarely upon the right to recover for what the services performed on Sunday were reasonably worth. Sec. 4595, Stats. (1898), prohibits "labor, business or work, except only works of necessity and charity," and no attempt was made by respondent to bring itself within the exception, if it were possible for it to do so. Under a similar statute in New York a contract for the publication of an advertisement in a newspaper printed Saturday night and issued Sunday was held

void. *Smith v. Wilcox,* 24 N. Y. 353. This court has held to a strict rule against the enforcement of Sunday contracts. *Troewert v. Decker,* 51 Wis. 46, 8 N. W. 26; *Vinz v. Beatty,* 61 Wis. 645, 21 N. W. 787; *Cohn v. Heimbauch,* 86 Wis. 176, 56 N. W. 638; *Williams v. Lane,* 87 Wis. 152, 58 N. W. 77; *Howe v. Ballard,* 113 Wis. 375, 89 N. W. 136. In *Williams v. Lane, supra,* the last materials in a mechanic's lien case were furnished on Sunday, and, although actually used in the work, it was held that no recovery could be had therefor, since no subsequent promise was made to pay and none could be implied. In *Sherry v. Madler,* 123 Wis. 621, 101 N. W. 1095, it was held that, where a contract is void because executed on Sunday, acts of subsequent recognition do not constitute ratification of the original contract, such contract being absolutely void and incapable of ratification. In face of the statute and repeated decisions of this court, we see no escape from the conclusion that the plaintiff cannot recover for the Sunday items. If the rule of the statute be wrong, it is for the legislature, not the courts, to afford relief.

It is also insisted by appellant that there is an entire failure of proof on the item May 31, 1906, $78.10. We cannot agree with counsel for appellant on this point. A *prima facie* case was made on the whole bill for advertising, namely, $248.67, and no attempt was made to contradict it. The evidence was sufficient, especially in connection with the admissions made on the trial. It is also urged by counsel for appellant that the reasonableness of the charge for advertising in plaintiff's paper was not proven. We think there was sufficient evidence to support the finding of the jury on this point.

Error is assigned respecting rulings on evidence, denying motions for nonsuit and directed verdict, refusal to charge as requested, in instructing the jury, and denial of motion for new trial. We do not regard these alleged errors of sufficient gravity to warrant treatment in the view we take of the case.

It is sufficient to say that, with the exception of allowing recovery for the Sunday items, we find no prejudicial error in the record. It follows that the judgment of the court below must be modified in accordance with this opinion.

By the Court.—The judgment of the court below is modified by deducting therefrom $170, the amount of the Sunday advertising, and as so modified is affirmed as of the date of the judgment.

KEENA, by guardian *ad litem*, Respondent, vs. AMERICAN BOX TOE COMPANY, Appellant.

November 19—December 6, 1910.

Master and servant: Dangerous machinery: Duty to give warning: Infant employee: Questions for jury: Instructions to jury: Prejudicial error: Guarding machinery: Evidence: Special verdict: Form: Adverse witnesses: Constitutional law.

1. A danger in the operation of machinery which may be held as matter of law to be so open and obvious to an adult employee that there was no duty to warn him thereof may be held otherwise under the same circumstances if the employee is an infant of tender years, and it may then properly be a question for the jury whether the infant employee knew and appreciated, or ought to have known and appreciated, not only the existence of the danger but the extent and character of the risk to which he was subjected thereby.
2. Thus, in this case, it was properly a question for the jury whether a girl fourteen years old should, without warning or instruction, have known and appreciated the extent of the risk to which she was subjected in passing leather shoe tips over the top of two revolving steel rollers about eight inches in diameter between which the tips were being pressed, she standing on the side of the machine where there was no danger, but not being tall enough to look over the upper roller and see the place where she was expected to deposit the tips.
3. In an action for injuries to an infant employee whose fingers were caught between the rollers of a machine at which she was

working, there being no claim that the machine was defective or that the employer was required by sec. 1636*j*, Stats. (1898), to guard such rollers, and the only negligence charged being the failure to warn or instruct her of the danger, it was error to submit to the jury the question whether the machine, in the condition in which it was at the time, was dangerous to the defendant's employees when engaged in their ordinary duties, and in connection with such question to read to the jury said sec. 1636*j* and instruct them that it was in force at the time of the accident.

4. Such error must be held to have been prejudicial where it is impossible from the verdict to tell whether the jury based its finding that defendant was negligent upon the failure to give warning or upon the unguarded condition of the machine.

5. It was also error in such a case to allow proof that at some previous time there had been a guard of some kind on the machine, which had been taken off before the accident.

6. Admitted facts need not be included in a special verdict, but may properly be included in order that the verdict may cover all material facts.

7. An appropriate form of special verdict is suggested in an action where an infant employee sues for injuries alleged to have resulted from the employer's failure to give warning of dangers incident to the work.

[8. Whether the legislature can authorize the calling and examination of an employee of a corporation as an adverse witness, as in sec. 4068, Stats. (Laws of 1907, ch. 271), without giving similar authority in respect to an employee of an individual, doubted.]

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action for personal injuries. It appeared on the trial that on July 20, 1907, the plaintiff was injured while working at a machine in the defendant's shop in Milwaukee, she being at the time fourteen years and two months old. She had been employed by the defendant corporation about six weeks before the accident, her principal duties being to count and pack in boxes the shoe tips made by the company, which were pieces of leather and canvas pressed together, four or five inches in length and about three inches in width. On

the day of the accident she was called by her brother, Walter Keena, who was foreman of the shop, to assist him at a machine which consisted of two steel rollers about eight inches in diameter, operated by power, and used to straighten the shoe tips as they were passed between the rollers. The machine stands on a table and the rollers revolve toward each other in the manner of a clothes wringer, there being a small shelf about three inches wide on each side. The foreman stood on the side where the rollers move toward each other and fed the tips into the machine between the rollers, and the plaintiff stood upon the other side and was required to take the tips as they came out of the rollers. She had done this before and had been accustomed to pack them in boxes as she took them out, but on this occasion she was told by the foreman to pass them over the top roller when she had got about fifteen or twenty of them and give them to him and he would pack them. She worked about ten minutes, part of the time giving the tips to the foreman and part of the time laying them down upon the shelf upon the foreman's side of the machine in front of the rollers. She claims that she did the latter when he was busy and could not take them. She also testifies that she was not tall enough to look over the machine. After working ten minutes or so, as she withdrew her hand after depositing a pile of tips upon the foreman's side of the machine, her fingers were in some manner caught between the rollers and two of them badly crushed so as to necessitate amputation. The plaintiff claims that she had received no warning or instruction as to the dangers connected with this machine. The jury returned the following special verdict:

"(1) Was the plaintiff injured on the 20th day of July, 1907, by having the fingers of her right hand caught and crushed between the rolls of the 'rolling machine' of the defendant company? *A.* (by the court by consent of counsel). Yes.

"(2) Did the defendant company, through its foreman,

caution or warn the plaintiff not to get her fingers near or in the rolls in question? *A.* No.

"(3) Was the 'rolling machine,' in the condition in which it was at the time the plaintiff was injured, dangerous to the employees of the defendant company when engaged in their ordinary duties about the operation of said machine? *A.* Yes.

"(4) Did the defendant negligently fail to warn the plaintiff of any danger incident to the work in which she was engaged at the time of her injury, which was known or ought to have been known to the defendant, but which was unknown or unappreciated by the plaintiff? *A.* Yes.

"(5) Was the defendant guilty of negligence which was the proximate cause of the plaintiff's injury? *A.* Yes.

"(6) Ought the plaintiff, in reaching over the roller machine and placing the leather tips on the shelf on the feeding side of the machine, to have known that there was danger of getting her fingers caught between the rollers? *A.* No.

"(7) Did any failure on the part of the plaintiff to exercise ordinary care for her own safety proximately contribute to her injury? *A.* No.

"(8) What sum will reasonably compensate the plaintiff for her injury? *A.* $1,800."

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

Harry M. Silber, attorney, and *A. J. Schmitz,* of counsel, for the respondent.

WINSLOW, C. J. The broad claim is made that the defendant was under no duty to warn the plaintiff of the dangers connected with the operation of the machine, because such dangers, if any, were so open and obvious that even a child of plaintiff's age must be presumed to have known and appreciated them. Upon this contention reliance is placed on *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Kuich v. Milwaukee B. Co.* 139 Wis. 101, 120 N. W. 261; and similar cases.

That the case is very close to the border line cannot be doubted. As to an adult under such circumstances it would

be at once said by the court that the danger was obvious and that he needed no instruction. But how as to a child of fourteen years? The difference in duty which may exist in the case of a child of such tender years and in the case of an adult was quite fully stated and the authorities collated in *Schumacher v. Tuttle P. Co.* 142 Wis. 631, 126 N. W. 46. There seems no necessity of going over the subject again. It is sufficient to say that it will often be held as matter of law that a danger is open and obvious to an adult and that he needs no caution, when it would also be held under the same circumstances, if an infant of tender years be involved, that it was properly a question for the jury whether he knew and appreciated or ought to have known and appreciated not only the existence of the dangerous agency but the extent and character of the risk to which he was subjected thereby. In the present case we have concluded that it was properly a question for the jury whether this infant, without warning or instruction, should have known and appreciated the extent of the risk to which she was subjected in passing the tips back over the rollers as she was directed to do. She was but fourteen years of age and had had practically no experience with machinery; she was standing on the side of the machine where there was no danger; she was not tall enough to look over the top roll and see the place where she was expected to deposit the tips which she took away from the machine; and we think it was fairly a question for the jury whether under these circumstances so young and inexperienced a child should be held to have known and appreciated, without warning, the risk which she was running, or the danger that a slight miscalculation in setting down the tips or in withdrawing her hand might bring a finger or two in contact with the roller.

There was, however, one very palpable and prejudicial error committed by the trial court in the trial of the case and which necessitates reversal of the present judgment. The complaint charged negligence in one respect only, namely, in

neglecting to warn or instruct the plaintiff as to the dangers incident to the operation of the machine. There was no claim that the machine was in any respect defective. Nor could it be claimed that these rollers were required to be fenced or guarded under the provisions of sec. 1636*j*, Stats. (1898). That section only covers "belting, shafting, gearing, hoists, fly-wheels, elevators and drums," and these rollers do not come within any of those classes. Hence the third question of the verdict had no proper function to perform in the case and should not have been submitted. To accentuate this error the trial judge read to the jury sec. 1636*j* in connection with his instructions on the third question, and told them that it was in force at the time of the accident. This statute was absolutely immaterial, and the reading of it could leave no other thought on the minds of the jury than the thought that the trial judge had decided that it had application to the case and required the rolls to be guarded if dangerous to employees.

These errors might not affect the judgment if the jury had found affirmatively that the proximate cause of the accident was the negligent failure to warn the plaintiff of the danger, but they did not. It is impossible to tell from the verdict whether they based their conclusion of negligence on the failure to warn or on the unguarded condition of the machine.

These considerations also make it certain that it was error to allow proof that at some time previous to the accident there had been a guard of some nature upon the machine, which had been taken off.

Some exceptions are argued involving the form of the questions in the special verdict and the refusal of the court to submit certain questions proposed by the appellant. We do not find it necessary to state these exceptions in detail. As before indicated, the third question of the verdict was improperly included. The questions at issue were few and simple. Perhaps if it were not for the fatal error resulting from the insertion of the third question and the instruction incorporating

sec. 1636*j* in the charge, we might be able to say that the issues were substantially covered by the remaining questions, but they are not happily worded and upon another trial may be much simplified.

The first question is strictly unnecessary, because the fact was admitted both in the pleadings and the evidence, but is properly enough included in the verdict in order that it may cover all the facts. The remaining questions might well be framed substantially as follows: Was the danger of getting her fingers caught in the rollers so obvious that the plaintiff, considering her age and experience, should have known and appreciated it prior to her injury? If not, then did the defendant fail to give the plaintiff such warning or instruction prior to her injury as would enable a person of her age and experience, exercising ordinary care, to appreciate such danger? If the last question be answered in the affirmative, then was such failure the proximate cause of the injury? Did any lack of ordinary care on the part of the plaintiff proximately contribute to her injury? What sum will reasonably compensate the plaintiff for her injury?

Walter Keena, the plaintiff's brother, who set her at work and who testified that he was "foreman and superintendent" of the defendant company, was called as an adverse witness by the plaintiff, under sec. 4068, Stats. (1898), as amended by ch. 271, Laws of 1907. His examination as an adverse witness was objected to on the ground that so much of the statute as permits the mere employee of a corporation to be examined as an adverse witness is unconstitutional under the doctrine laid down in *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456. The objection was overruled and he was examined as if under cross-examination. All the testimony which the witness gave on this adverse examination related to the guard which had formerly been upon the machine, its construction and purpose.

This testimony was entirely immaterial, because negligence

in the construction of the machine was not charged, nor was the machine within the statute, sec. 1636*j*. As this ruling makes it probable that it will not be desired to call the witness adversely upon another trial, it seems that it will not be necessary to decide the constitutional question raised at this time, and this court does not take up such questions unless absolutely necessary. It may be said, however, that under the *Phipps Case* it seems that it is a very serious question whether the legislature can authorize the employee of a corporation to be called and treated as an adverse witness and not authorize the employee of an individual to be so called. It would doubtless be the part of wisdom to avoid raising so serious a question except in case of absolute necessity, and it appears that there will be no such necessity upon a second trial.

None of the other errors claimed is deemed of sufficient importance to require attention.

By the Court.—Judgment reversed, and action remanded for a new trial.

MAXCY, Appellant, vs. CITY OF OSHKOSH and others, Respondents.

November 21—December 6, 1910.

Wills: Construction: Public charitable trusts: Reverter: Conditions: City as trustee: Gift for manual training school: Right of city to comply with conditions: Raising additional fund: Naming school: Tuition fees, from whom exacted: Construction of building: Municipal bonds: Provision for payment of interest: Name of bonds: "Completion" of school building includes equipment.

1. If a will contains no express provision for a reverter in the event of a diversion of a fund given for a public purpose, none can be implied.
2. After reciting that her deceased husband had wished to give property to a city *in trust* for the founding of an educational institution, and that her will was made for the purpose of car-

rying out such wish, testatrix gave property to trustees to be held in trust for the purpose of building and perpetually maintaining a manual training school. Upon certain conditions the property was to be transferred to the city or to trustees for it, to be used perpetually to provide and maintain such a school. There was no provision for a reverter. *Held*, that a public charitable trust was thereby created.

3. One giving property by will to any legitimate charity may generally prescribe the conditions under which the donation is made, and when those conditions are accepted there is a binding obligation which may be enforced through the courts.

4. In order to create a public charitable trust there must be some public benefit open to a vague and indefinite number of persons until they are selected or appointed to be the particular beneficiaries of the trust for the time being.

5. A city may become the trustee of a charitable trust where the donation is made to aid some public purpose, charitable in its nature, which it is the legal duty of the city to support and provide for; and when such a trust is accepted the city assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts, and must perpetually administer the charitable fund in accordance with the expressed wish of the donor.

6. Where property is given to a city in trust to found and maintain an educational institution, upon condition that a further sum for that purpose be raised by or for the city, the city has no right to bond itself for such purpose unless it is authorized by law to maintain such a school or institution as a part of its general system of education.

7. Under its charter (Laws of 1891, ch. 59, subch. XI, sec. 4) the city of Oshkosh has power to erect one or more buildings to be used exclusively for manual training and may maintain such schools for the benefit of all pupils of school age and all other persons whom it may have the right to admit to any of its public schools.

8. A will made for the purpose of carrying out the wish of the deceased husband of testatrix to found an institution wherein sound business principles might be taught and where pupils might be fitted for manufacturing and business careers and domestic duties, gave property for the purpose of founding and perpetually maintaining "a manual training school" the object of which should be to teach cooking, sewing, and domestic economy to girls, and "all things of mechanical and other technical work to young men, and to teach to both girls and boys such

things as are usually taught in modern manual training schools, and . . . such things as the progress of time develops ought to be taught in a manual training school." *Held*, that the school so provided for was such a manual training school as the city of Oshkosh had a right to maintain at public expense, and that the city might, therefore, accept the donation and comply with a condition thereof requiring the raising of an additional sum for the same purpose.

9. Read with the context, the words "all things of mechanical or other technical work" refer to such things as were being or might properly be taught in a modern manual training school maintained at public expense; and no particular significance should be attached to the reference to the deceased husband's wish to found an "institution" of learning.

10. A condition of a testamentary gift to found and maintain a school, that it shall bear the name of the deceased husband of testatrix, may lawfully be complied with by a city.

11. A testamentary gift to found and maintain a manual training school in a city was made upon condition that an additional $50,000 for that purpose be raised by or for the city. The will directed that the whole fund, except so much as might be necessary to purchase a site and erect suitable buildings, and the income thereof should be a perpetual fund to be used to provide, support, and maintain such school. The testatrix intended that the school should be a memorial to her deceased husband, and stipulated that a substantial building be constructed and equipped with modern appliances, placing no restriction upon the amount which should be expended therefor. *Held*, that by raising the $50,000 and expending the whole thereof for a building and equipment for the school the city would substantially comply with the requirements of the will, and thereby obviate the objection that the city had no power to raise a fund to be invested in perpetuity for such a purpose.

12. Where a gift to a city in aid of some municipal purpose is made on condition that the city itself make a contribution for that purpose, the city may do so, provided it might lawfully make such expenditure had no gift been made.

13. Property devoted to a charitable use, where a trust is created, must, if the gift is accepted, be irrevocably devoted to such use, and, in case of any attempted diversion, equity will intervene and, if necessary, name a new trustee to carry out the purpose of the trust.

14. The term "perpetuity," as applied to charitable trusts, retains its original meaning of an inalienable and indestructible interest,

subject, however, to unforeseen social changes or eventualities preventing the continued existence of the trust.

15. A city may lawfully contribute funds to aid in the construction of a public school building provided for in part by a gift made under such circumstances as to create a trust in perpetuity and therefore requiring the permanent maintenance of the school.

16. The ward schools of a city are "district" schools within the meaning of sec. 3, art. X, Const., and whatever may lawfully be taught in such schools must be taught without the exaction of tuition fees from resident children of school age.

17. Every will should, as far as possible, be interpreted from the standpoint of testator, and attendant circumstances, such as the condition of his family and the amount and character of his property, should be taken into consideration as part of the *res gestæ*, when the language is not plain nor the meaning obvious.

18. It is the duty of the courts to uphold charitable bequests if it can be done without violating any provision of statute or principle of law.

19. A will which gave property to a city to found and maintain a manual training school, upon condition that an additional sum for the same purpose be raised by or for the city and that a tuition fee should be charged which in the judgment of the city should be sufficient, together with the income of the fund provided, to perpetually properly maintain the school, is construed, in the light of all the circumstances, as showing that it was the intention of the testatrix that tuition fees should be charged only to those pupils from whom the city might lawfully exact such fees (*i. e.* nonresident pupils and those over school age), and that the city might therefore lawfully comply with such condition.

20. The action of a city in raising and appropriating money to build a manual training school was not void, although induced by a conditional testamentary gift for such a school, where the testatrix was actuated by no ulterior motive in making the gift and neither she nor her family could reap any material benefit therefrom.

21. The city charter of Oshkosh (sec. 6, subch. XI, ch. 59, Laws of 1891), providing that no school building shall be constructed until the plans therefor have been adopted and approved by the board of education, does not make the adoption of plans a condition precedent to the right of the city to vote bonds to raise money for the erection of a school building.

22. Although the city charter (sec. 7, subch. XI, ch. 59, Laws of 1891) required the city treasurer to keep all moneys raised for school

purposes as a separate fund and disburse the same only on the orders of the board of education, a formal tender of money raised by the sale of bonds to erect a building for a manual training school, made by the city to the trustees of a testamentary gift for such school conditioned upon the city raising the sum tendered, did not vitiate the bonds or create an unlawful diversion of the money, the tender being made merely to satisfy said trustees that the condition had been complied with, and the city thereupon becoming entitled to receive the gift as trustee and to hold and expend both it and the proceeds of the bonds for said school, and there being nothing to show that the city does not in good faith intend to expend said proceeds in erecting the building.

23. Sec. 926—11, Stats. (Supp. 1906: Laws of 1903, chs. 228, 428), providing that no bonds shall be issued by a city unless the council shall provide for a direct annual tax "sufficient to pay the interest thereon," etc., does not require an exact statement of the amount which is to be levied annually; and an ordinance providing for the levy of a tax to pay interest on a certain amount of bonds at a rate "not to exceed four per cent. per annum" is sufficiently definite and certain where the bonds issued in fact bear four per cent.

24. Bonds headed "Manual Training School Bond of the City of Oshkosh" and reciting in the body thereof that they are issued "for the purpose of erecting, constructing, and maintaining a manual training school building in and for the city," sufficiently comply with the requirement of said sec. 926—11 that such bonds shall "bear an appropriate name indicating the purpose of their issue."

25. Under the authority given by said sec. 926—11 to issue bonds "for the erection, construction, and *completion* of school buildings," bonds may be issued to build and *equip* a school building; such a building not being *complete*, within the meaning of the statute, until equipped.

APPEALS from an order and a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

On December 31, 1907, Helen A. Beach, a resident of the city of *Oshkosh,* died leaving a will, which was thereafter duly admitted to probate. The twentieth paragraph of such will reads as follows:

"It was the desire of my husband, Orville Beach, as expressed to me in the later years of his life, that after making

provision for his relatives and those having a claim upon his bounty the remainder of his property should be given to the city of *Oshkosh,* Wisconsin, in trust, for the purpose of founding an institution in this city in which the coming generations might be taught sound business principles, be fitted for manufacturing and business careers, and domestic duties. On or about the 25th day of August, 1900, my husband began the preparation of a will, but owing to the fact that he had not decided upon the exact form of such charity, at the time of his death the same instrument was uncompleted.

"To carry out the known wishes and desires of my said husband, I give, devise and bequeath to Charles Schriber and George Hilton, of the city of *Oshkosh,* Wisconsin, and to their successors in trust all the rest, residue and remainder of my property, real, personal and mixed, wheresoever located, to have and to hold the same in trust for the uses and purposes following, to wit: Founding, preparing, constructing and maintaining perpetually a manual training school, with the appurtenances and all things appertaining thereto, and the necessary buildings and premises, and with the necessary appurtenances and equipments, in the city of *Oshkosh,* Winnebago county, Wisconsin. The object of the school to be the teaching of cooking, sewing and household economy to girls, and the teaching of all things of mechanical and other technical work to young men, and to teach to both girls and boys such things as are usually taught in modern manual training schools, and to teach such things as the progress of time develops should and ought to be taught in a manual training school; but this gift, grant, devise and bequest is made upon the express condition that within three (3) years after my decease, the said city of *Oshkosh,* the citizens thereof or other persons or parties or any or either or all thereof, shall raise, grant, give and donate to the city of *Oshkosh,* Wisconsin, for the purposes aforesaid, the sum of fifty thousand dollars ($50,000), when said sum of fifty thousand dollars ($50,000) shall be so raised and donated as aforesaid to the said city of *Oshkosh,* then all the rest, residue and remainder of my estate, of every name and nature, so given to my said trustees, together with all additions thereto and increase thereof, shall be conveyed, assigned, transferred and set over absolutely, by my said trustees, by necessary and proper instrument of transfer to the said city of *Oshkosh,* or any lawful trustees by said

city of *Oshkosh,* lawfully selected, the whole of such fund (except so much thereof as may be necessary to purchase a suitable site and to erect suitable buildings for such manual training school) and the income thereof shall be a perpetual fund, to be used and enjoyed by the said city of *Oshkosh,* or trustees aforesaid, perpetually, to provide, support and maintain a manual training school with all the appurtenances and equipment appertaining thereto, in the said city of *Oshkosh,* Wisconsin. This gift, grant, devise and bequest is made upon the further express condition that the said school shall be named and perpetually known as the Orville Beach Memorial Manual Training School of the city of *Oshkosh,* and that a tuition fee shall be charged, which in the judgment of the city of *Oshkosh,* or trustees appointed by the said city of *Oshkosh,* shall be sufficient, together with the income of the aforesaid fund, to perpetually properly maintain said school.

"My said trustees shall forthwith, upon my decease, convert all of my real estate into personal property, and it is my intention that for the purpose of the construction of this gift and donation, all of my property shall be deemed in law personal property.

"My said executors are hereby authorized and empowered to bargain, grant and convey any and all real estate that I may own at the time of my decease, and to make, execute and acknowledge the forms of conveyance necessary in that behalf, with or without covenants of warranty.

"If either of my aforesaid trustees shall refuse to act, resign, die or become incapacitated to act, all the provisions, rights and authority hereby conferred and imposed upon my trustees shall survive, belong and be imposed upon the survivor thereof with full power and authority in the premises. If, by refusal, death, resignation or incapacity to act, there shall be a vacancy as to all of said trustees, or none to act, the circuit court of Winnebago county, Wisconsin, shall have power to appoint and select a trustee or trustees to follow, carry out and execute the aforesaid provisions of this will, as aforesaid.

"This gift, grant, donation, devise and bequest shall not be vitiated, null or void, because the said city of *Oshkosh,* Wisconsin, at the time of my decease, shall not have the power to accept or carry out the said donation, if it shall acquire or ob-

tain such power within three years after my decease, and before the transfer is made by said trustees of said property and the income as aforesaid. The said city of *Oshkosh* shall be responsible for the faithful execution of said trust and property, proceeds, fund and income hereby donated, and may, if deemed advisable, execute and carry out the same by trustees legally selected, but the city of *Oshkosh* shall be responsible for the acts of said trustees.

"Before my said trustees shall so transfer said property, proceeds, income and increase as aforesaid, the said city of *Oshkosh,* by resolution or ordinance of its common council by a vote of a majority of all its members, shall accept and agree faithfully to carry out and execute the conditions hereof and of said trust.

"It is my desire that said manual training school building shall be of a substantial nature and character and shall be constructed of Lake Superior brown stone or other stone of equal quality.

"My said trustees are hereby authorized and empowered during said three years, or until said sum of fifty thousand dollars ($50,000) shall have been raised and donated as aforesaid, to invest the property hereby given them in trust as they may deem best.

"In case of failure to raise the sum of fifty thousand dollars ($50,000) as aforesaid, within three years, then and in that case the said property and the whole thereof is to be paid, transferred and assigned absolutely to Clayton W. Finch of Port Chester, New York, Charles T. Beach of Sandy Hill, New York, Charles B. Cole of the city of *Oshkosh,* Wisconsin, Kathryn Cool of Saratoga Springs, New York, and Louis B. Thompson of New York City, and to their heirs and assigns absolutely and forever, in equal shares, to each one-fifth (1-5) thereof."

After paying the debts and specific legacies provided for in the will, the residue of the estate to be devoted to the purposes provided for in the twentieth paragraph of the will amounts to between $130,000 and $135,000. The common council of the city of *Oshkosh* passed a resolution accepting the gift and the terms under which it was made, and issued

and sold its bonds to the amount of $50,000 to provide the necessary funds to make the gift available to the city. The plaintiff brings this action as a taxpayer, in his own behalf as well as in behalf of taxpayers generally, to restrain the city of *Oshkosh* from issuing or selling bonds to make up the fund of $50,000 provided for in the will of Mrs. Beach, and also to restrain the city from using the proceeds of any bonds that might be sold for any such purpose. Application was made to the court for a preliminary injunction restraining the defendant from selling or negotiating the bonds until the suit was finally determined. The court denied relief by way of a preliminary injunction. The case was tried on its merits, and judgment was rendered in favor of the defendants dismissing the complaint. From such judgment and from the order refusing a temporary injunction the plaintiff appeals.

The cause was argued October 31, 1910, and upon suggestion by the court was reargued on November 21, 1910.

For the appellant there were briefs by *C. D. Jackson, J. C. Thompson,* and *A. E. Thompson,* attorneys, and *E. M. Smart,* of counsel, all of whom participated in the oral argument except *Mr. Jackson.*

For the respondents there were briefs by *Fred Beglinger,* city attorney, and *Charles Barber* and *George Hilton,* of counsel, and oral argument by *Mr. Beglinger* and *Mr. Barber.* On the reargument *Mr. Hilton* also argued orally.

BARNES, J. The questions presented on this appeal are numerous and important and some of them are fraught with difficulties. The briefs filed with us contain over 550 pages of printed matter. Two days were consumed on the argument, and on a reargument of the case which was ordered, and if the court is not sufficiently informed to reach a correct conclusion it is not the fault of the counsel in the case, who from their respective standpoints have displayed commendable diligence and learning in presenting to the court the facts and the

law involved. The appellant contends that the judgment and order appealed from should be reversed on the following grounds:

(1) The will created a charitable trust and must be construed with reference to the duties, obligations, and liabilities surrounding such trust and imposed on the trustees thereof, and the city could not act as trustee of the trust attempted to be created.

(2) The will did not contemplate the erection of such a school building and the maintenance of such a school as the city of *Oshkosh* was authorized by law to build or maintain, and therefore the taxpayers could not be compelled to contribute any part of the fund provided for by the will.

(3) The city of *Oshkosh* had no power to enter into an agreement to permanently maintain the school or to perpetually carry out the terms of the trust.

(4) It is beyond the power of the city of *Oshkosh* to raise money by taxation for the purpose of creating a fund, out of the earnings of which the school will in the future be supported in part at least.

(5) The will required the exaction of a tuition fee from pupils attending the school, and the city has no legal authority to raise money by taxation to support such a school.

(6) The trust created is void on the ground of public policy.

(7) The bonds involved in this suit are illegal for the following additional reasons: (a) Because no plans for the school building had been prepared and submitted to the board of education and approved by that board, as required by the city charter, before the bonds were voted; (b) because the city charter requires the city treasurer to keep all moneys raised for school purposes in a separate fund and to disburse the same on the order of the board of education, while it was not intended that the money received from the sale of these bonds should be so kept or so disbursed; (c) because no legal tax levy was made

by the common council to meet the interest on the bonds as it fell due; (d) because the bonds are not appropriately named to indicate the purpose for which they were issued; (e) because the bonds were voted for constructing and equipping a manual training school, and the council had no authority to vote bonds for the purpose of *equipping* a school building.

1. The first question to be determined is the nature of the bequest. The plaintiff contends that it was the intention of the testatrix to create a charitable trust. The defendant maintains that it was the intention of Mrs. Beach to place the absolute title of her property in the city, when certain conditions were complied with, unfettered by any trust, and that in the event of a diversion of the fund any person in interest might proceed to secure appropriate redress in the courts as for a condition broken. In support of this view the case of *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, is cited, as well as other cases. If this view be correct, it eliminates some difficulties that arise in case it be held that a charitable trust is created.

The will before us follows quite closely the provisions of the will of Mrs. Harris, involved in the *Danforth Case,* in so far as the creation of a trust is concerned. The only material difference between the provisions of the two wills in this regard is found in the clause of the will of Mrs. Harris which provides that, in case of a diversion of the property or fund donated to any purpose other than that contemplated by the will, there should be a reversion to the heirs of the testatrix and those of her deceased husband. The court reached the conclusion that no trust was created and that the title passed charged only with a condition subsequent. In the will of Mrs. Beach there is no express provision for a reverter in the event of a diversion of the fund, and none can be implied under the law of this state. *Strong v. Doty,* 32 Wis. 381; *Thorndike v. Milwaukee A. Co.* 143 Wis. 1, 12, 126 N. W. 881.

There are many provisions in the will under consideration which indicate an intention on the part of the testatrix to create a public charitable trust. It recites that it was the intention of the husband of the testatrix that the property bequeathed should be given to the city of *Oshkosh in trust,* and that the will was made for the purpose of carrying out such intention. The property is given to the trustees named in the will *to be held in trust* for the purpose of building and *perpetually* maintaining a manual training school. The balance left after the building was built and equipped was to constitute a *perpetual fund* to be used by the city in maintaining the school. The school was to be *perpetually* known as the Orville Beach Memorial Manual Training School. Tuition fees in a sufficient amount should be exacted, which, added to the income from the fund, would *perpetually* maintain the school. There is no provision for a reverter in case of a violation of any or all of these provisions. It seems highly improbable that the testatrix had in mind the giving of this splendid donation in such a way that it might be dissipated or disposed of for any purpose which the city saw fit as soon as it came into possession of the property. It is likewise improbable that the donation would have been made had the donor understood that any such result could legally follow. Persons making wills are not obliged to donate money to charitable uses. When they do, they have the right to devote it to any legitimate charity they see fit and to generally prescribe the conditions under which the donation is made. When those conditions are accepted there is a binding obligation that may be enforced through the courts. 2 Perry, Trusts, § 733 and cases cited. No great amount of formality in the use of language is necessary in order to create a public charitable trust. The courts look to the purpose for which the gift was made. In order to create such a trust there must be some public benefit open to a vague and indefinite number of persons until they are selected or appointed to be the particular beneficiaries of the

trust for the time being. 2 Perry, Trusts, §§ 687, 710; *Dodge v. Williams,* 46 Wis. 70, 97, 98, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier,* 105 Wis. 485, 505, 514, 82 N. W. 345; *Sawtelle v. Witham,* 94 Wis. 412, 69 N. W. 72. Gifts to institutions of learning and for educational purposes are almost invariably held to be gifts for charitable purposes. 2 Perry, Trusts, § 700, and cases cited; *Dodge v. Williams, supra.* So we conclude here that it was the intention of the testatrix to create a charitable trust, public in its character, and that the will must stand or fall on such interpretation of its terms.

That a city may become the trustee of a charitable trust, where the donation is made to aid some public purpose charitable in its nature which it is the legal duty of the city to support and provide for, does not admit of doubt. When the trust is accepted the city assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts, and among them is the obligation to perpetually administer the charitable fund in accordance with the expressed wish of the testator. *Thorndike v. Milwaukee A. Co.* 143 Wis. 1, 126 N. W. 881; *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W. 986; *Philadelphia v. Girard's Heirs,* 45 Pa. St. 1, 25; *Vidal v. Girard's Ex'rs,* 2 How. 127, 180, 190; *McDonogh's Ex'rs v. Murdock,* 15 How. 367; *Webb v. Neal,* 5 Allen, 575; *McIntire Poor School v. Zanesville C. & Mfg. Co.* 9 Ohio, 203; *First Parish v. Cole,* 3 Pick. 232; *Comm'rs v. McPherson,* 1 Speers (S. C.) 218; *Governor v. Gridley,* Walk. (Miss.) 328; *Carmichael v. Trustees,* 3 How. (Miss.) 84; *Phillips v. Harrow,* 93 Iowa, 92, 61 N. W. 434; *Quincy v. Att'y Gen.* 160 Mass. 431, 35 N. E. 1066; *Chambers v. St. Louis,* 29 Mo. 543; *Delaney v. Salina,* 34 Kan. 532; *Maynard v. Woodard,* 36 Mich. 423; 2 Dillon, Mun. Corp. (4th ed.) § 567; *Higginson v. Turner,* 171 Mass. 586, 51 N. E. 172. In so far as the will before us enjoins on the city the duty of perpetual maintenance, it imposes no obliga-

tion which the law would not impose had the will been silent on the subject, if a charitable trust otherwise valid has been created. Such being the case, the requirement is innocuous and cannot affect the validity of the will. *Sheldon v. Stockbridge,* 67 Vt. 299, 31 Atl. 414.

2. Having reached the conclusion that a charitable trust was intended to be created, we now come to a consideration of the specific clauses of the will which it is asserted render it impossible to carry out the scheme of the testatrix. In the first place it is urged that the will contemplates the founding of such a school or institution of learning as the city of *Oshkosh* has no power to maintain, and therefore it cannot raise money by taxation to aid in the enterprise. In this connection it may as well be said now as later that it is the opinion of the court that unless the city has the right to maintain such a school as is provided for, as part of its general system of education, it has no right to vote the bonds involved in this suit.

Sec. 496*b,* Stats. (1898), provides that "any board having charge of a free high school or of a high school having a course of study equivalent to the course or courses prescribed by the state superintendent for such schools may establish and maintain a department of manual training in connection with the school under its management." This statute was amended by ch. 503, Laws of 1907, so as to permit manual training to be taught to the pupils in "the three upper grades next below the high school."

The charter of the city of *Oshkosh* (Laws of 1891, ch. 59, subch. XI, sec. 4) is broader in its terms than is the general law. It authorizes the board of education "to establish and organize such high schools and so many district schools and branches of the same, primary schools, night schools, schools of manual training and kindergartens as they may deem expedient." This provision was enacted in 1891.

Under this provision it is clear that the city has the power

to erect one or more buildings to be used exclusively for the purpose of teaching manual training, and that the city may maintain such a school for the benefit of all pupils of school age, as well as for the benefit of all persons whom it may have the right to admit to any of its public schools. As a matter of fact, the city, acting under its charter, has provided instruction in manual training to all pupils attending its public schools, at an expense of five or six thousand dollars per year. For a time it afforded such instruction to children who attended the parochial schools of the city, such instruction being given in the public schools however. The practice was discontinued for lack of accommodations.

It is apparent that the term "manual training" may have a broad significance or it may be correctly applied to instruction in a very few simple things. Neither the general statute nor the charter of the defendant undertakes to say how little or how much may or must be taught on the subject. This is wisely left to the discretion of the school authorities, and, this being so, we would expect to find a wide variance in the kind of instruction given and the extent to which it is carried on in the various schools in the state in which the subject is taught. Indeed, it may be wise administration to direct the activities of boys along different lines in a school located in a factory district, from those which might be pursued in a school surrounded by different environments. The matter of teaching manual training in the public schools of this country is comparatively new and seems to embrace some of the ideas of the trade school which has accomplished much in some European countries. The idea is presently in a state of evolution with large possibilities before it. It has been carried on in some portions of the country for forty years and in some of the schools of this state for about twenty-five years, and the number of schools giving instruction in it is gradually increasing. So the innovation cannot be called a fad and therefore liable to be discontinued. Manual training has been taught

in the *Oshkosh* schools for thirteen years. It would seem to be a very practical and useful course of instruction, at least as much so as many branches of education that are taught in our common schools.

It now behooves us to ascertain whether the school provided for by Mrs. Beach is such a school as the city of *Oshkosh* has the right to maintain at public expense. There is some broad general language used in reference to the character of the school which she had in mind. She says it was the purpose of her husband to found an *institution* wherein sound business principles might be taught and where pupils might be fitted for manufacturing and business careers. To carry out the wishes of her husband she makes the donation for the purpose of preparing, constructing, and maintaining a *manual training* school. She says that the object of such school shall be to teach cooking, sewing, and domestic economy to girls, and "all things of mechanical and other technical work to young men, and to teach to both girls and boys *such things as are usually taught in modern manual training schools, and to teach such things as the progress of time develops ought to be taught in a manual training school.*" If the words "all things of mechanical or other technical work" be segregated from the rest of the sentence in which they are used, they might be interpreted as indicating an intent on the part of the testatrix to found a school at which civil, mechanical, electrical, and mining engineering would be taught, as well as other technical subjects in which instruction is given only in our higher institutions of learning, and which cannot be successfully taught without a large outlay for equipment, and cannot be profitably taught to students of immature years or to those not having the equivalent of a high school education. We do not think that this is the kind of a school the testatrix had in mind. She wanted a school which all should be permitted to attend and to derive benefit from and where the many could be fitted for "manufacturing and business careers,"

rather than that the few should become experts along technical lines. We must assume that when she speaks of a manual training school she refers to such a school as the term ordinarily implies. She has herself designated the institution as a "manual training school," and said that such things should be taught there as are usually taught in such schools, and that the school should keep pace with the development and enlargement of the course of instruction in such schools. Reading the entire paragraph, we think that the words "all things of mechanical and other technical work" were intended to refer to such things as were being taught or might properly be taught in a modern manual training school maintained at public expense. We do not think any particular significance can be attached to the fact that the testatrix speaks of the intent of her husband to found an "institution" of learning or that it is to be named the Orville Beach Memorial Manual Training School. A separate building was contemplated by the will. The city has a right to construct and maintain such a building and to devote it exclusively to manual training. When maintained it becomes an "institution of learning," else the city would have no right to maintain it at all. It is a very common practice for cities at the present time to name their schools after distinguished citizens who might or might not have been residents thereof. If the testatrix here desired to perpetuate the name of her husband in the manner stated in the will, she has amply requited the city for the small privilege demanded, and we perceive no good reason why the city may not comply with her wishes in this behalf. It has been expressly held that such a requirement may be lawfully made and lawfully complied with. *Jones v. Habersham,* 13 Fed. Cas. 957 (3 Woods, 443), affirmed in 107 U. S. 174; *Phillips v. Harrow,* 93 Iowa, 92, 61 N. W. 434.

3. It is urged that the donation made by the testatrix, together with the $50,000 which the city proposes to raise, must be mingled as a common fund out of which a site is to be pur-

chased and a building is to be erected and equipped, and the balance of which is to be so invested as to produce an income to be used for the purpose of maintaining the school, and that the city of *Oshkosh* has no power to raise a fund to be invested in perpetuity for such a purpose.

There is much force in this contention, and the city evidently appreciated this fact and has attempted to avoid the effect of it by raising the $50,000 for the express purpose of building and equipping the school. Independent of any donation, manifestly the city had a right to vote bonds for this purpose. The question is, Has the city by so doing complied with the requirements of the will? The city cannot divert funds raised for a lawful purpose to one which it has no right to raise money for by taxation. The proceeds of the bonds must be used for the purpose for which they were voted. If such use of the money does not satisfy the conditions of the will, then the bequest cannot be sustained, if we assume that a taxpayer has the right to raise the objection. An important question, therefore, is whether the city has in fact complied with the requirements of the will.

In this connection it is proper to observe that the testatrix intended that the school should be erected as a memorial to her husband; that she stipulated that a substantial, modern, up-to-date building be constructed, preferably of Lake Superior brown stone; that she desired that such school should be equipped with modern, up-to-date appliances so that manual training could be taught to the best advantage; that she placed no restriction upon the city in reference to the amount of money that might be invested in the school building and in its equipment; that the city has under the terms of the will the absolute right to invest $50,000 in the building and equipment; that we must presume that the city in good faith intends to do so; and, finally, that the testatrix was presumed to know the law and to know what were the legal rights of the city. The city by using the money raised by it for the

purpose of erecting and equipping the school building may not be technically complying with the expressed wish of the testatrix, but it is certainly complying with her wish in substance and effect, and it would be extremely technical to hold under such circumstances that the city forfeited its right to receive the donation. Every purpose which the testatrix had in mind will be carried into full effect by the city using the fund raised by it to build and equip the school building.

It is suggested rather than argued that the city had no right to contribute to such a fund in any case. But it is settled in *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, that, where a donation is tendered to a municipality in aid of some municipal purpose for which it is authorized to expend money on condition that the municipality itself make a contribution in aid of the purpose of the donor, it may do so, provided the lawful right existed to make the expenditure had no donation been made. The cases cited elsewhere in the opinion amply support this view.

4. It is further urged that, a trust in perpetuity being created by the will, the property devoted to the charitable use must always be applied to such use, and that it is beyond the power of the city of *Oshkosh* to raise money to build a manual training school which must be forever maintained as such. This contention raises one of the most difficult questions in the case. The general rule of law is that money or property devoted to a charitable use, where a trust is created, must, if the gift is accepted, be irrevocably devoted to such use, and that in case of attempted diversion a court of equity will intervene, and if necessary name a new trustee to carry out the objects and purposes of the trust. In other words, the term "perpetuity" as applied to charitable trusts has retained its original significance, in that it means an inalienable and indestructible interest. Generally speaking, any limitation that suspends the power of alienation beyond the period allowed by law creates a perpetuity, but we are not dealing with a perpetuity of this kind.

However, this general language in reference to the meaning of a perpetuity as applied to a charitable trust cannot be taken too literally. Otherwise charitable trusts could not be created at all, and it cannot be doubted that the city of *Oshkosh* could become the trustee of such a trust. No one is wise enough to say what social changes the mutations of time may bring about or what political or other cataclysms the future may witness. The city of *Oshkosh* may be destroyed by an earthquake or become a lake or a desert. It may go the way of Nineveh and Tyre, and exist as a remembrance only to remote generations. But, notwithstanding the fact that such eventualities may occur, it can still become the trustee of a charitable trust. The courts deal with practical situations and ordinarily pay little heed to remote contingencies. We must presume that the city of *Oshkosh* will live and thrive and that the system of free district schools guaranteed by the constitution will be maintained therein. We must also presume that instruction in the languages, in mathematics, and in other subjects now taught therein, will be continued. The tendency of the times is to enlarge the school curriculum instead of reducing it. It is fair to assume that any branch of knowledge that has been firmly engrafted in our system of education has come to stay, and there is nothing in the record to indicate that manual training in our public schools has not come to stay. Of course laws may be passed in the future that will prohibit the teaching of manual training, but the testatrix knew of this possibility when she made her gift and was willing to take the chances. So we are called upon to say whether the city may, by accepting this gift, bind itself to do what in all human probability it would do if no gift had been made; that is, to maintain a public school system and teach manual training as part of its general system of education. Mrs. Beach knew when she made her will that the school building she was providing for might not and in fact could not endure for all time. Fire might destroy it, and, if it did not, time would disintegrate it and render it unfit for use. Conditions

might demand that a newer, more commodious, and more modern building should be constructed at some time in the future, even before the building provided for had ceased to be serviceable. All the city will have to do to comply with the terms of the will will be to place such a memorial tablet in the new building as was placed in the old, and carry on a system of instruction therein in harmony with the expressed wish of the testatrix. There is the possibility that the city of *Oshkosh* will become atrophied and fall into such a state of decay that it will not or cannot maintain a public school system. But here again we have the remote possibility only, and if decay must come its progress will, to some extent at least, be retarded by the income derived from this donation. Public moneys invested in school buildings and grounds are in substance and effect invested in perpetuity. School buildings may outlive their usefulness and become obsolete, but they are usually replaced by other and more costly, more pretentious, more substantial, and more modern structures. Various causes may render it advisable to erect a new building on a different site from that occupied by the old one, but the proceeds derived from the sale of the old site is reinvested in the new site and building, and generally a great deal more. The matter of making donations of the general character of the one made here is not uncommon, and as wealth accumulates there is reason to believe that their number will increase. Most persons making such gifts have well-defined ideas as to the purpose to which they desire their money to be put. Stability above all things is an end desired by donors. The undertaking of the city of *Oshkosh* to perpetually maintain this school is not contrary to the letter of the law. At best it can only be said that there is no positive statute authorizing the city to enter into such an undertaking where its money is invested in the school. If the city had none of its own funds invested in the building, it could beyond question enter into the obligation, because it could act as trustee of a fund do-

nated for a charitable purpose which was at the same time a municipal one, and the agreement to perpetually maintain would add nothing to the obligation which the law imposes on the trustee in the absence of an express agreement. By the city saying that it will perpetually maintain the school in question, it is saying that it will do the thing which it would do had no promise been exacted, so long as it maintains a public school system. If it does so, then it has maintained the school in perpetuity within the meaning of the law. The investment of public moneys in the building of schools being of a perpetual character, we think it is no violation of the spirit of the law to hold that a city may contribute funds to aid in the construction of a public school building provided for in part by a gift made under such circumstances as to create a trust in perpetuity, and therefore requiring the permanent maintenance of the school. When the city of *Oshkosh* accepted its charter it subjected itself to the burdens imposed by the constitution. One of those burdens was the maintenance of a system of district schools in which education should be free to all pupils of school age, so long as the city existed and so long as the provision of the constitution survived; or, in other words, in perpetuity. To carry out this obligation school buildings must be maintained in perpetuity. The assumption of the duty of teaching manual training in a separate building is entirely in harmony with the constitutional requirement.

The conclusion reached is not without support in the adjudicated cases, as will be seen by a reference to the following: *Piper v. Moulton,* 72 Me. 155; *Drury v. Natick,* 10 Allen, 169; *Budd v. Budd,* 59 Fed. 735; *School Trustees v. Hoboken,* 70 N. J. Eq. 630, 62 Atl. 1; *Kelley v. Kennard,* 60 N. H. 1; *East Tenn. Univ. v. Knoxville,* 65 Tenn. 166.

5. The will provides that "a tuition fee shall be charged, which in the judgment of the city of *Oshkosh,* or trustees appointed by said city of *Oshkosh,* shall be sufficient, together

with the income of the aforesaid fund, to perpetually properly maintain said school," and it is urged with much force that the city cannot contribute the money of its taxpayers to maintain a school in which tuition is charged. In fact, this is the proposition to which the appellant's counsel devoted the most attention in their briefs and in their first oral arguments of the cause.

It must be conceded that the testatrix intended to donate her property to a school that would at least be open to all children of school age. That the ward schools of the city of *Oshkosh* are "district" schools within the meaning of sec. 3, art. X, of the constitution, does not admit of doubt. Further than this it is unnecessary to go. That the testatrix intended that pupils in the ward schools of the city should have the benefit of the manual training school seems equally clear. The provision of the constitution above referred to requires the legislature to provide for the establishment of district schools, and that "such schools shall be free and without charge for tuition to all children between the ages of four and twenty years." This requirement should not be restricted by construction. Whatever may lawfully be taught in such a school is part of the curriculum therein, and the fact that the teaching of manual training is not made compulsory by law does not alter the fact that when it is taught it becomes part of the curriculum. The pupil in a district school is just as much entitled to have manual training taught him without the exaction of a charge, if it be taught at all, as he is to have mathematics taught without being obliged to pay therefor. Besides, the city of *Oshkosh* is not authorized by any law to charge tuition in any kind of a school which it is empowered to maintain, and we do not wish to be understood as intimating that it could be so authorized. Unless this will can reasonably be interpreted as meaning that a tuition charge need not be exacted of all pupils, or unless this provision of the will may be rejected, it cannot be sustained. So we proceed to ascertain what the testatrix intended, as well as we may.

The intention of the testatrix must be gathered from the whole will taken together, and not from detached portions of it alone. *Lane v. Vick,* 3 How. 464; *Cook v. Weaver,* 12 Ga. 47; *Jackson v. Hoover,* 26 Ind. 511; *Parker v. Wasley's Ex'r,* 9 Grat. 477; *Hoxie v. Hoxie,* 7 Paige, 187; *Nightingale v. Sheldon,* 5 Mason, 336; *Jackson v. Kip,* 2 Paine, 366; 2 Jarman, Wills, 840.

The struggle in such a case, as Mr. Justice STORY observes, "is to accomplish the real objects of the testator, so far as they can be accomplished, consistently with the principles of law; but in no case to exceed his intention fairly deducible from the very words of the will." *Nightingale v. Sheldon, supra.*

The intention of the testator, as expressed in his will, governs; and this intention must be discerned through the words of the will itself as applied to the subject matter and the surrounding circumstances. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786; Schouler, Wills (2d ed.) § 466, p. 500; 1 Redf. Wills, 433; 2 Jarman, Wills, 838; *Parsons v. Winslow,* 6 Mass. 169, 175; *Chrystie v. Phyfe,* 19 N. Y. 344; *Williamson v. Williamson,* 57 N. C. 281.

Every will should as far as possible be interpreted from the standpoint of the testator, and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration as part of the *res gestæ* when the language is not plain nor the meaning obvious. Schouler, Wills, *supra; Smith v. Bell,* 6 Pet. 68; *Blake v. Hawkins,* 98 U. S. 315; *Brown v. Thorndike,* 15 Pick. 388; *Postlethwaite's Appeal,* 68 Pa. St. 477; *Perry v. Hunter,* 2 R. I. 80, 81; *Brown v. Bartlett,* 58 N. H. 511; *In re Donges's Estate, supra.*

Where the language used in a will is reasonably susceptible of two different constructions, one of which will defeat and the other sustain the provisions, the doubt is to be resolved in favor of the construction which will give effect to the will, rather than the one which will defeat it. *In re Donges's Estate,* 103 Wis. 497, 501, 79 N. W. 786.

While devises and bequests may be void upon many grounds, "it is the policy of the law not to seek grounds to avoid either; but so to deal with both, if it can be done upon sound legal construction, as to uphold and enforce them." It is the duty of the courts to uphold charitable bequests if it can be done without violating any provision of statute or principle of law. "At the same time it is the duty of the court carefully to weigh the objections made against the bequests, and to give effect to any sufficient to render the bequests void in law." *Dodge v. Williams,* 46 Wis. 70, 91, 1 N. W. 92, 50 N. W. 1103.

"Courts here, as anciently, look with favor upon all donations to charitable uses, and give effect to them where it is possible to do so consistent with rules of law, and to that end the most liberal rules the nature of the case will admit of, within the limits of ordinary chancery jurisdiction, will be resorted to if necessary." *Harrington v. Pier,* 105 Wis. 485, 503, 504, 82 N. W. 345.

There are two classes of pupils who may attend this manual training school from whom a tuition fee can legally be exacted, to wit, nonresidents and those over school age, and it remains to be seen whether the will can reasonably be so construed as to warrant the conclusion that the testatrix intended that only the pupils falling within such classes should be charged.

Construing the tuition clause in the light of the circumstances which surrounded the testatrix when she made her will, we have about this situation: We should presume that the testatrix knew the law; we must presume that she intended to make a valid will. The testatrix had no children of her own and her husband was dead. The husband himself had in contemplation the founding of this training school, but he died before he carried out his purpose. The testatrix provided for the establishment of this school to comply with the wishes of her deceased husband as well as her own. The rela-

tives of the testatrix, and those of her husband, for the most part lived in distant states, and seem to have been quite liberally remembered in her will; and, finally, the testatrix was making the gift to a trustee that was presently teaching manual training in its schools, and that had the right to supplement the income from the trust fund by moneys raised by taxation.

We have a class of pupils to whom tuition may be lawfully charged; very strong circumstances indicating an intent on the part of the testatrix to make a valid will; and the legal presumption that the testatrix knew the law. The question is, Can the court under these circumstances say that the testatrix intended that tuition fees should be charged only to those pupils attending the manual training school from whom tuition could lawfully be exacted, and can the will be reasonably construed as expressing such intent, read in the light of the circumstances which surrounded the testatrix when the will was made? If a construction can be adopted which will render the will valid, without doing violence to its language, it is, under the rules of construction referred to, to be preferred to the one which will render it void.

The case presenting the closest analogy on this point to the one under consideration is *Irvin v. Gregory,* 86 Ga. 605, 13 S. E. 120. By a statute of that state the board of education of the town of Lumpkin was required to exact "of each child" an incidental fee of not less than five nor more than ten dollars. The constitution of the state prohibited the exaction of any tuition fee or charge to resident pupils, but such a charge might be imposed on nonresidents. The court held that the constitutionality of the act could be sustained on the ground that the provision in regard to the incidental fee was intended to apply only to nonresident pupils. So we think here that the validity of this will can be sustained without doing violence to its language, by holding that what the testatrix intended was that a tuition charge might be exacted only from such

pupils as the city of *Oshkosh* could legally exact such a fee from. The will does not undertake to specify to whom the charge shall be made. It does not say, as did the Georgia statute, that the fee shall be paid by "each child," but simply that such a tuition fee shall be charged as in the judgment of the city of *Oshkosh* shall be sufficient, together with the income of the fund provided for, to properly maintain the school. If the income is sufficient, no charge need be made. If the city sees fit to make up any deficit from taxation, no tuition fee need be charged. If the income, together with the tuition fee which might lawfully be charged, is insufficient to properly maintain the school, and the city should refuse to vote funds for that purpose, it may be said that the privilege of instruction in manual training may be denied to some pupils whom the testatrix intended to provide for and that therefore her wishes may be defeated. But it would be far-fetched to say that the school will not be more liberally patronized or that a greater number will not receive instruction therein where such instruction is free than would patronize the school if they were compelled to pay for the privilege.

6. It is argued here and may be conceded that the donation of Mrs. Beach was the impelling cause which produced action on the part of the common council of the city of *Oshkosh*, and that, were it not for the gift, no money would have been presently raised by the city to build a manual training school. And it is argued that the effect of the gift was to hold out a substantial money inducement to influence official action and to thus bring about results which would not have followed had no conditional gift been made. Corporate action is said to be void under such circumstances, and the following cases in our own court, as well as some others, are cited in support of this view: *Shelby v. Miller*, 114 Wis. 660, 91 N. W. 86; *State ex rel. Wildman v. Kidd*, 63 Wis. 337, 23 N. W. 703; *McMillan v. Fond du Lac*, 139 Wis. 367, 120 N. W. 240; *State ex rel. Newell v. Purdy*, 36 Wis. 213; *State ex rel. Dith-*

mar v. Bunnell, 131 Wis. 198, 110 N. W. 177; and *Sharpe v. Hasey,* 141 Wis. 76, 123 N. W. 647. To these might be added *State ex rel. Curtis v. Geneva,* 107 Wis. 1, 8, 82 N. W. 550, and *State ex rel. Dosch v. Ryan,* 127 Wis. 599, 106 N. W. 1093. The cases of *Shelby v. Miller, Sharpe v. Hasey,* and *State ex rel. Dosch v. Ryan* presented situations where a resident of a town was personally and pecuniarily interested in having a highway laid out for his convenience, and where, for the purpose of securing something which he otherwise would not get, he offered to defray a portion of the expense of opening the highway in order to bring about favorable official action. The cases of *State ex rel. Newell v. Purdy* and *State ex rel. Dithmar v. Bunnell* involved pre-election offers and representations made by candidates as to what they would do in the event of their election. In the *Purdy Case* the candidate agreed to relinquish part of his salary and in the *Bunnell Case* he offered to draw certain legal papers free of charge. *State ex rel. Wildman v. Kidd* involved an unlawful agreement concerning a division of property in case a new school district was created, and *McMillan v. Fond du Lac* involved a contract in which an alderman of the city was personally interested. This latter case has no direct bearing on the point under consideration. The other cases are decided upon the theory that the offers made were made to secure a direct and substantial benefit to the parties making them; that they were not primarily made to promote the common good; that they were well calculated to secure results which would not be secured had no such offers been made; and that such offers in substance and effect constituted bribery, which as a matter of course vitiated any official action taken in pursuance of such inducement.

The situation here is very different. The testatrix herself could reap no material benefit from her offer. She left no children who could enjoy the fruits of it. It does not appear that she left any relatives in *Oshkosh* who could do so. She

had no ulterior or vicious motive in doing what she did, and counsel do not assert that she had. Any such suggestion would be repugnant to our sense of decency and no such suggestion is made. So the reason on which the decisions cited rest is wanting in the case before us, and unless their doctrine is carried beyond its present confines the point is not well taken; and it is said in *Sharpe v. Hasey, supra,* that the doctrine has been carried far enough. It is argued that the sustaining of gifts coupled with conditions such as Mrs. Beach made may result in all kinds of municipal extravagance in order to meet conditions that may hereafter be made by donors. Whether such a situation is likely to arise or not we do not know. If such results follow, the legislature may easily and readily enact a law that will put a quietus on the abuse. Charitable gifts not coupled with any such condition as is complained of may become inimical to the welfare of society also; but even that abuse, if such it should ever become, can be met by the legislature enacting statutes of mortmain as was done by the British parliament. The cases sustaining the right of a municipality to accept a gift for a purpose which it is authorized to carry on and to support by means of taxation, and to accept such gift on the condition that such municipality make a contribution to the fund, are cited elsewhere in this opinion, and, as already said, correctly state the law in this regard.

7. (a) It is further urged that the bond issue is void because the city charter of the city of *Oshkosh* (sec. 6, subch. XI, ch. 59, Laws of 1891) provides that no school building shall be constructed until the plans for the same shall have been adopted and approved by the board of education, and that no action whatever was taken by such board in reference to the manual training school for which the bonds were voted. The contention is that the requisite foundation for taking any steps to build any school building are wanting because of nonaction by the school board.

The position taken is not tenable. By subch. XI of the city charter the title to all school buildings is vested in the city. It is made the duty of the board of public works under the direction of the common council to erect school buildings and keep them in repair. The common council has the exclusive right to levy taxes and provide for the erection of school buildings. The school board may approve or disapprove of proposed plans for a school building, but the right to propose such plans is vested in the city.

Either of two methods might be pursued by the city. It might first prepare plans and secure estimates of the cost of such a building as it deemed desirable to build, and then proceed to provide for the necessary funds to carry out the proposed project as best it could, or it might first make provision for the amount of money which it was considered desirable to expend, and fit its plans to its purse. Perhaps the first method of procedure would be the more logical, but it is not exclusive, and we are not cited to any provision in the charter which makes the adoption of plans a condition precedent to the right to vote bonds to raise money to erect a school building.

(b) Again, it is urged that sec. 7 of subch. XI of the charter requires the city treasurer to keep all moneys raised for school purposes as a separate fund, and disburse the same only on the orders of the board of education, and that the money here raised was tendered to the trustees named in the will to create a common fund, part of which might be used for building a school and part for the purposes of investment, the income of which only would be available to the city.

We have already said that the money derived from the sale of the bonds must be applied for the purpose for which it was voted, to wit, to build a school building, and that this is a substantial compliance with the terms of the will. It does appear from the record that the city went through the form of making a tender to the trustees of the $50,000 derived from

the sale of the bonds. It was not required to make any such tender, and we do not understand that it amounted to anything more than a mere ceremony or formality which was gone through with to satisfy the trustees that the city had raised the amount of money required by the terms of the will and that it was available for the purposes therein specified. When the city complied with the conditions of the will it was absolutely entitled to receive, hold, and expend both funds in its character of trustee. So we do not perceive how the alleged tender could serve to vitiate the bonds or how it created any unlawful diversion of the money received from the sale of them. We cannot say, as we are urged to, that it is not the intention of the city of *Oshkosh* in good faith to expend the money raised from the sale of its bonds to erect a school building. The circuit court so found as a matter of fact. As yet there has been no diversion, and, as far as we are able to discover, no threatened diversion. If the time comes when the interests of the taxpayers are being jeopardized in this regard, the power of the courts is ample to protect them.

(c) It is further contended that the bond issue is void because it is not in compliance with the constitution and laws of the state. The particular provisions relied on are sec. 926—11, Stats. 1898 (as amended by ch. 228 and ch. 428, Laws of 1903), subd. 2 of sec. 658, Stats. (1898), and sec. 3 of art. XI of the constitution.

Sec. 926—11 provides that no bonds shall be issued unless the council shall provide for a direct annual tax *sufficient to pay the interest thereon* as it falls due and the principal within twenty years. The statute further provides that all such bonds shall bear an appropriate name indicating the purpose of their issue and reciting the fact that the city has provided for the collection of an annual tax to pay the interest as it falls due and the principal within twenty years. The other statute relied on and the constitutional provision quoted add nothing to

the requirement of sec. 926—11 that is material to the question raised.

The ordinance providing for the bond issue recited that "such bonds shall be due and payable in twenty years after their date and shall bear interest *not to exceed* four per cent. per annum, interest payable annually," and made a tax levy to pay the principal and interest of the bonds. The particular objection raised is that a levy of a tax to pay interest on $50,000 of bonds at a rate "*not to exceed* four per cent." is not sufficiently definite and certain to answer the provisions of the law referred to. The bonds issued bear interest at four per cent., so that the amount that must be raised is within the limitation fixed by the ordinance, and has become definite and certain. We think it would be extremely technical not to hold that the ordinance makes a good tax levy so long as the maximum rate of interest fixed therein was not exceeded. The statute does not require that the ordinance designate in dollars and cents the amount of money that should be levied annually to pay interest. Such a levy is unlike the ordinary one, in that it provides for something that must be done from time to time in the future, and so long as the amount is subject to definite ascertainment when the tax is to be carried out in the tax roll, and the amount does not exceed that provided for by the ordinance, we do not perceive any valid objection to it.

(d) It is further urged that the bonds are void because they do not bear "an appropriate name indicating the purpose of their issue," as required by sec. 926—11. The bonds are headed "Manual Training School Bond of the City of *Oshkosh,* Wisconsin," and in the body of them it is recited that they are issued "for the purpose of erecting, constructing, and maintaining a manual training school building in and for the city of *Oshkosh,* to be known as the Orville Beach Memorial Manual Training School of the City of *Oshkosh.*" It appears

plainly enough from the heading of the bonds that they are issued for the purpose of building and equipping a manual training school. Manifestly, the legislature intended nothing more than a heading which in general terms would disclose the purpose for which the bond was issued. The bond must be christened and must have an appropriate name indicative of the purpose of issue, but it was not meant that such name should consist of minute recitals showing the dimensions of the building, the subjects that it was contemplated should be taught therein, and such like.

(e) The bond ordinance recited that the bonds were issued "for the purpose of erecting, constructing, and *equipping* a manual training school building." The city, in voting the bonds, acted under the authority conferred by subd. 3 of sec. 926—11, Stats. (1898), as amended, and it is urged that the city council had no power under this section to vote bonds where any part of the proceeds thereof was to be used for "equipping" a school. The case of *Neacy v. Milwaukee,* 142 Wis. 590, 126 N. W. 8, is said to be conclusive upon the proposition, if followed. In the *Neacy Case* the statute involved conferred the right on the city to issue bonds for the construction or purchase of a municipal lighting plant. The bonds were voted to "erect and *maintain* such a plant." Maintenance, of course, includes the cost of ordinary repairs and upkeep, and the bond issue was held unauthorized because no statutory authority existed for raising money through the issue of bonds to defray the ordinary upkeep expenses of such a plant.

The statute under which the bonds we are considering were voted authorized the city to vote bonds "for the erection, construction, and completion" of school buildings. The question is, Are bonds voted to *build* and *equip* a manual training school voted to *build* and *complete* such a school? Is a school building complete within the meaning of the statute before it

is provided with seats, desks, blackboards, and other necessary paraphernalia? Is it complete before it is ready for occupancy for school purposes? Is a manual training school complete before it is supplied with the necessary lathes, benches, and other equipment to carry on manual training work? Is a city permitted to raise money by a sale of bonds to erect a school building, but prohibited from voting enough to seat the building after it is erected. The word "completion" found in the statute must be given some force, unless we say it was intended to be used as synonymous with the words "erection" and "construction." In principle we see no good reason why bonds may not be issued to equip a school building after it is built as well as to erect the building itself, and it cannot well be said that a school building is complete until it is ready for use and occupancy. The *Neacy Case* does not reach the question here involved. Bonds are a charge against the taxpayer of the future. They are justifiable because the future taxpayer derives a benefit from permanent improvements, in the first cost of which he would not otherwise share. But after the initial expenditure, ordinary maintenance expense should be borne by the taxpayers who are presently receiving the benefit of the improvement. So we conclude that it is within the power of a city, acting under sec. 926—11, to vote money to build and *equip* a school building.

We have endeavored to cover all the points raised that we deem material, and we might say that no new ones have occurred to us. We do not wish to be understood as holding that all of the questions here discussed could properly be raised in a taxpayer's action. It is stated in one of the briefs that there is a proceeding pending brought by one of the heirs, wherein, we assume, all matters can be and are raised that a taxpayer might not appropriately reach; and in view of the importance of the case, the desirability of an early settlement of the controversy, and the express wish of the respondent

that the whole controversy be disposed of, we have thought it best to do so.

By the Court.—The judgment and order appealed from are affirmed.

The following opinion was filed January 30, 1911:

MARSHALL, J. (*concurring*). I cannot well forego writing briefly concurring with the decision in this case. Added to *In re Kavanaugh's Will,* 143 Wis. 90, 126 N. W. 672, it marks such an epoch in our judicial history, I wish to emphasize the event to the end that nothing may be left undone which I can do to so firmly entrench the beneficent principles of the law of charities in our system that all danger of their being hereafter obscured in judicial confusion or misconception, will be effectually guarded against. "'Tis strange, 'tis passing strange," that any such guard should be thought of respecting a source of unwritten law. It would not occur as a matter within reasonable probabilities were it not for the long regrettable history of the subject, particularly in New York, commencing with the enunciation of correct principles in *Williams v. Williams,* 8 N. Y. 525, extending therefrom through the long judicial conflict which followed, and ending with practical elimination from the law of that state of the choicest features thereof, evolved by the wisdom of the ages and grounded in the principles of Christianity; that feature which enables the possessor of wealth to freely devote the same in perpetuity to the betterment of human conditions.

The elimination here suggested was so effectual by the close of the half century of conflict intervening between *Williams v. Williams, supra,* and *Allen v. Stevens,* 161 N. Y. 122, 55 N. E. 568, that in the latter, speaking of the wrecks which had been wrought and the irremediable loss to humanity which had occurred by its so construing the statute as to defeat the benevolent purposes of those who had desired to perpetuate

their names by the good they might be instrumental in effecting to mankind after their own departure from earthly activities, the court said:

"No attempt to create an original charity has survived the test of an application by the court of the rules of law to the language employed by the testator."

That conception of the wrong which had been judicially done moved the court with shadowy aid of new written law, which under ordinary circumstances would not have been appreciable, to grasp thereat as the drowning man seizes the merest appearance of assistance, and, as we ventured to say in *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, "by an exhibition of heroics which has no parallel in the books," turn backward to the starting point so unfortunately departed from, efface the half century of lamentable wandering, and reintrench the principles of *Williams v. Williams, supra.*

Our own history challenges attention not much less efficiently to danger of impairment of the law of charities as handed down by the fathers; upon the false theory, as in New York, that the statutes were, in the beginning, framed in hostility thereto. Our lawgivers, at the start, were, in the main, well schooled in the written law of New York from which ours was largely modeled. They must be presumed to have been imbued with the judicial view then entertained in the parent state, significantly voiced by the learned chancellor in *Shotwell v. Mott,* 2 Sandf. Ch. 46, most emphatically repudiating the suggestion that the statute makers entertained even a suspicion that their work, either in letter or spirit, would be thought to have been done with the idea of displacing or affecting in any way the common law as to charities. Note the conception of the subject by the eminent chancellor:

"We inherited from our mother country the law of charitable uses, with the blessed spirit that gave rise to it. . . . Did the revised statutes intend to cut off gifts and devises to charitable uses for all time to come? For if the article 'Of Uses

and Trusts' applies to charitable uses, that must have been the intention in respect of all save devises to corporations directly for their own use. The proposition is startling, and of vast importance. And I presume every one on first hearing it, will declare that it is impossible; that no legislature in the nineteenth century could have intended such a result."

However, we must confess that some suggestions in the decisions of this court prior to *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, without decidedly committing the court thereto, were in line with the departure in New York from *Williams v. Williams, supra.* The revisers of the statutes by suggestion to the legislature, manifestly, endeavored to stem that trend of judicial thought and the legislature promptly acted upon such suggestion, as indicated in my opinion in *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258. The judicial leaning was not so firmly entrenched in our system but that in the learned opinion of Chief Justice RYAN in *Dodge v. Williams,* rendered soon after the revision of the statutes, it was brushed aside and the principles of *Williams v. Williams* clearly written into our judicial code.

The unfortunate allusions to the dominating spirit of the opinion in *Dodge v. Williams* and to its letter as well, coming little short of engrafting the lamentable departure in New York upon our system, are sufficiently referred to in detail in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, and need not be repeated here. Effectually, it was thought, though not without some difficulty for want of unanimity, all seeming or real departure from *Dodge v. Williams* was cured in the decision in the *Harrington Case,* the earlier case being given its true dignity as condemning, at least as regards personalty, the idea that the common-law doctrine of charities had been, in any way or to any extent, displaced in this state. That was reinforced by *Hood v. Dorer,* 107 Wis. 149, 82 N. W. 546, and *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650.

Unfortunately, because of seeming interference as to real estate in *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W. 986, when

we came to *Danforth v. Oshkosh, supra,* the court, not only refused to extend the doctrine of *Harrington v. Pier* to realty, but held in effect, if not in terms, that the common law as to charities respecting real estate had been wholly displaced by written law, and furthermore, created much confusion respecting what was really intended to be covered before.

So it will be seen the specter of the New York heresy, I can call it nothing else, which was buried out of sight in that state in *Allen v. Stevens,* 161 N. Y. 122, 55 N. E. 568, and had menaced the situation here for some twenty-five years, at last, effectually, it was feared by the writer, *took a place at our judicial table,* leading to the writing of my appeal, found in the report of the *Danforth Case,* to the blessed spirit that gave rise to the law of charities and to the logic of the history of the subject in New York and that in our own state as well, grounding hope upon the immutability of truth and the assurance of "the inspired apostle" that "charity never faileth," to move the court some time to return to the lines of *Dodge v. Williams* and *Harrington v. Pier;* such lines as applying to realty as clearly in spirit as they do in letter to personalty; and that the lawmaking power might lend its aid to accomplish that end by expressly removing any supposed or real impediment to the consummation of that result. That the heart of the people was not misconceived in making the appeal for legislative aid bears evidence in the fact that, at the first opportunity, ch. 511, Laws of 1905, was spread on the statute books, removing any such impediment in the most explicit terms. Thus was obviated any necessity to again resort to anything in the nature of a judicial invention, as in the *Danforth Case,* in my judgment, to save, though fraught with infirmities, a designed charity, by treating it as a conveyance without trust features and upon condition subsequent; leaving it with the well known infirmities of a benevolence dependent upon the law of private trusts for its survival and administration. Such a speedy removal of the danger discussed in the

opinion by the writer, concurred in by Mr. Justice SIEBECKER, in the *Danforth Case,* was more than could well have been hoped for when such opinion was written. Such removal was soon judicially recognized here in *In re Kavanaugh's Will,* 143 Wis. 90, 126 N. W. 672, and is now again observed with the satisfaction of all and with added significance, because of similarity of conditions with those in the *Danforth Case.*

This case marks then, as said in the beginning, an epoch, one of monumental character, in our jurisprudence because of the now more unmistakable restoration and firm entrenchment in our system than heretofore by *In re Kavanaugh's Will, supra,* of one of the most valuable of our inheritances from the mother country, "placing our state," without room for reasonable future controversy, "in the front rank of communities as regards favoring devises of privately accumulated wealth to charitable objects." The question submitted in the *Danforth Case,* "Shall we have incorporated into our system the thought so beautifully expressed, 'Charity in thought, speech, and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory and the inspired apostle exhausts his powerful eloquence in setting forth its beauty and the nothingness of all things without it'?" has been answered affirmatively in much if not the same circumstances as those which gave rise to the submission.

This decision could not well have been otherwise than it is, regardless of *Danforth v. Oshkosh,* in view of the fact that the people, aroused by the discussion there, soon spoke with unmistakable meaning on the subject. I am content to have it as it is; have it upon the theory that there is efficient room, under the circumstances, for distinguishing between the two cases on the question of whether there is a trust feature characterizing the one and none characterizing the other. Doubtless, since the creation involved in the former case was wholly,

in spirit, a charity, it was competent to read out of the instrument an intent sustaining it as a conveyance upon condition subsequent, if that could be done within the uttermost boundaries of reason, rather than that the benefaction should fail wholly. I think in the changed situation, wrought by the legislative declaration, the same rules of construction which conserved, to some extent, the efforts of the donor before, saving her creation as a conveyance on condition subsequent, would save a donation now, made in the same language, as a charitable trust with all the added advantages incident to such a trust.

So, from one viewpoint the opinion in this case overrules *Danforth v. Oshkosh,* so far as the court there limited the bequest to the lines of a conveyance upon condition, instead of giving it the effect intended, as I think. Whether I be right in that or not, the broader effect by construction, if need be, should, nevertheless, be given because of the change in the written law. The different result now from that before, doubtless has some support in the fact that the language of the will here, somewhat more emphatically than that in the instrument involved in the *Danforth Case,* gives character to the bequest, expressly, of a charitable trust, as said, in effect, in the able opinion written for the court by my brother BARNES. The points of difference as to the particular vital feature and the dilemma in which the court found itself in the former case, after holding that the statute, respecting realty at least, had displaced the common law as to charities, are sufficiently portrayed in the court's opinion now in harmony with my independent opinion in the former case. They show ample reason, in my judgment, for not following the latter as a precedent, or if it be one on its face for not following it at all, especially because of the legislative declaration.

It were better, perhaps under all the circumstances, that the bequest was sustained as it was in the *Danforth Case* than

that it should have failed wholly. However, time has only strengthened my opinion then expressed, that the logic indulged in to support the bequest was a mere judicial, though perhaps from one viewpoint justifiable, invention, yet, on the whole, the result was to defeat the real intent of the donor. But if so the infirmity may well be confined to that case. May the incident stand clothed only in its own peculiar characteristic, and so conditioned as not to endanger future efforts of the benevolently inclined to give of their fortunes to charitable objects, a consummation which this case may be regarded as having in great part accomplished.

CASES DETERMINED

AT THE

January Term, 1911.

HEDGER, Plaintiff in error, vs. THE STATE, Defendant in error.

September 17, 1910—January 10, 1911.

CRIMINAL LAW: HOMICIDE. (1–13) *Evidence: Sufficiency: Competency: Curing error by striking out: Uxoricide: Relations between spouses: Habits of accused: Immaterial errors: Result of inquest: Unlawful search by police.* (14–17) *Jury discharged after trial begun: Jeopardy: Challenge to juror: Discretion.* (18–25) *Instructions to jury: Degrees of murder: Malice: Intent to kill: Reasonable doubt: Motive: Contradictory testimony: Presumption of honest mistake: Weight of answer to hypothetical questions: Reputation: Double negative.* (26, 27) *New trial: Newly discovered evidence.*

1. Circumstantial evidence from which the jury might have concluded that the wife of the accused was murdered by shooting in their residence, about 7:45 a. m., when he and his wife were the only persons in the house and at the time when a shot was heard by the neighbors; that the accused was in the neighborhood or at the house during the day; and that he knew of his wife's death prior to the discovery of her body in the evening by another person, but failed to disclose the fact or give any alarm, is *held* sufficient to support a verdict of guilty.
2. Error in admitting evidence is cured by striking it out and directing the jury to disregard it, unless it affirmatively appears that the accused was nevertheless prejudiced thereby.
3. In cases of uxoricide great latitude of inquiry is permissible with respect to the relations existing between the spouses prior to the killing.
4. In such a case evidence that accused was frequently intoxicated

and that his health was impaired thereby, and describing his eccentricities and peculiarities and his general deportment, was admissible.

5. Testimony of one from whom the accused sought a loan to be secured by mortgage on his homestead, to the effect that he informed the accused that the wife of the latter refused to sign the mortgage, was competent.

6. Where evidence on the part of an accused is offered tending to show that a third person displayed alarm and feared he might be charged with the offense on account of something that occurred in the trial, the state may rebut the inference that this arose from a guilty conscience by proving that the prosecuting attorney suggested to such third person that counsel for the accused might charge him with the murder.

7. There was no error in permitting a witness for the state to testify to the number of strangers using the alley adjoining the house in which the murder was committed, by comparison with the number using other similar alleys.

8. It was within the discretion of the court to permit a witness for the state to testify to financial transactions between himself and the accused after the murder, and such testimony was not incompetent because it tended to show that the accused had money after his arrest.

9. Testimony that the accused mortgaged his homestead to raise money to defray expenses of his trial is *held*, though irrelevant and immaterial, not to have been prejudicial.

10. Testimony as to conversations between witnesses as to the duty of every citizen forthwith to report to the police any information they might have concerning the commission of the crime of murder, was irrelevant and immaterial, but was not prejudicial.

11. Where the prosecution seeks to establish that certain witnesses heard a shot at a stated time, it is competent to prove that these witnesses remarked to one another at the time that the sound heard was a shot.

12. In a prosecution for murder the verdict of a coroner's jury given in an inquest upon the body of deceased, to the effect that the death was caused by some person or persons unknown, is not competent evidence on behalf of the accused.

13. Evidence tending to show that police officers acted without authority in searching the premises of the accused and seizing his personal property, is not competent unless some of the property or papers so seized are offered in evidence on the part of the state and objection is made on the ground that the instruments of evidence so offered were procured in this unlawful way.

14. Where it is discovered, after the jury is accepted and the trial

in progress, that one of the jurors is not impartial, has formed and expressed an opinion in the case, and has testified falsely on the *voir dire*, the court may discharge the jury, impanel another, and begin the trial anew; and the accused will not thereby have been twice put in jeopardy.

15. This power of the court rests upon the ground of necessity, like the case of sickness or death of a juror or that of the presiding judge. It is absolutely necessary to discharge the first jury under such circumstances and begin anew in order to have a trial of the cause which is a trial and not a farce.

16. This power of the court cannot be exercised for its own convenience or in discretion, and can be exercised only in cases in which the law recognizes and points out the necessity for such action.

17. Sustaining the challenge of the prosecution to a juror is a matter largely within the discretion of the trial court, and its finding that the juror is not impartial is conclusive upon the appellate court, if there is evidence to sustain it.

18. The instructions to the jury must be tested in view of the questions before the court arising upon the information and evidence, and not academically or by contrast with the whole body of the law relating to homicide.

19. So tested, the charge in this case relating to implied malice and to the intent to kill which constitutes the "premeditated design" of murder in the first degree, is *held* not erroneous.

20. A charge that the reasonable doubt which entitles an accused person to an acquittal is the doubt of guilt reasonably arising from all the evidence in the case, was not, in view of its context, erroneous as excluding the right to an acquittal by reason of reasonable doubt arising from lack of evidence.

21. A charge to the effect that existence of a motive is not essential to a conviction for murder, but presence or absence of it is an evidentiary circumstance merely bearing, with more or less weight according to the circumstances, on the question of guilt, was not erroneous.

22. A charge that if there is a conflict in the testimony of witnesses "the presumption is that either one or the other of the witnesses may be honestly mistaken, rather than that either wilfully testified falsely," was not misleading or prejudicial to the accused, although technically that is not a presumption of law.

23. A charge to the effect that in weighing the answers of experts to hypothetical questions the facts stated in such questions should be kept in mind, and if not the same in material respects as the facts which the jury found to exist such opinions of the experts would be necessarily weak if not valueless, was correct.

24. A charge that "evidence of good reputation or good character

does not constitute a defense," was not erroneous or misleading when considered in connection with the whole charge on that subject, showing in what sense the word "defense" was used and understood.

25. A mere slip of the tongue causing a double negative is not always understood by ordinary people as an affirmative, and such mistake in a charge will not suffice for a reversal where the same proposition was many times stated correctly in the same charge and it is apparent the accused was not prejudiced by the error.

26. On a motion for a new trial on the ground of newly discovered evidence the motion may be denied if the trial court is convinced upon proper evidence that there is no reasonable probability that another jury, having before it all the former evidence together with the newly discovered evidence, would come to a different conclusion from that arrived at by the former jury.

27. In a case where the newly discovered evidence consisted of the testimony of a witness on a relevant and material point, but the witness was examined and cross-examined and therein his sanity, his veracity, and his general character were impeached by himself and others, the court may, upon the ground stated, deny the motion for a new trial.

ERROR to review a judgment and an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the plaintiff in error there were briefs by *Kronshage, McGovern, Goff, Fritz & Hannan,* and oral argument by *G. D. Goff, F. E. McGovern,* and *T. J. Hannan.*

For the defendant in error there were briefs by the *Attorney General, Chas. A. A. McGee,* district attorney, and *Norman L. Baker,* assistant district attorney, and the cause was argued orally by *Russell Jackson,* deputy attorney general, and by *Mr. McGee* and *Mr. Baker.*

The following opinion was filed October 25, 1910:

TIMLIN, J. *Ward E. Hedger* was found guilty of the murder in the first degree of his wife, Louise J., committed on September 9, 1909. On February 7, 1910, he was sentenced to imprisonment in the state prison for the full period

of his natural life. After judgment and sentence he moved for a new trial upon newly discovered evidence, and his motion was denied. He brings his cause to this court for review upon a writ of error to the judgment and sentence of conviction, and a separate writ of error to the order after judgment denying him a new trial. Under the first mentioned writ he assigns fifteen errors. The first, twelfth, thirteenth, fourteenth, and fifteenth go to the sufficiency of the evidence to support the conviction, and these will be considered together.

The accused and his wife had been married upwards of twenty years, had no children, and at the time of her death she was something over forty and he about fifty years of age. He owned a homestead at No. 1219 Cedar street in Milwaukee, where they resided, and some other property, and he carried on a dress-plaiting business at No. 105 Grand avenue, about seven minutes' ride on the street cars from a point at the intersection of Eleventh and Wells streets, two and one-half squares distant from his homestead. They leased a furnished room or rooms in their residence and were reputed thrifty, respectable people of moderate means. Accused was somewhat though not excessively addicted to the use of intoxicating liquor, and while his wife manifested some dissatisfaction on this ground their domestic relations were apparently ordinarily harmonious. Two young men had a room in the house, a Mr. Peterson, who was at the time of Mrs. Hedger's death temporarily out of the state, and a Mr. Conrad, who left the Hedger residence at seven o'clock and twenty minutes on the morning of September 9, 1909, and did not return until the evening of that day after the discovery of Mrs. Hedger's dead body. One Iver Harrang, who formerly roomed in the Hedger house, was at the time in question a medical student in his senior year and obliged to earn money to carry him through college. He was apparently practicing rigid economy and worked as night watch-

man from about 7 p. m. to 7 a. m. upon a viaduct in course of construction at a distance from the Hedger house. He was in ill health, had incipient tuberculosis, influenza, and a disordered stomach. He was in the habit of calling every evening about 6 o'clock, on his way to work, at Hedger's for a lunch to be eaten by him at midnight on his work. This lunch included a bottle of coffee and was prepared for and given to him by Mrs. Hedger gratuitously, and he had $70 in money which he left with Mrs. Hedger for safe keeping. His relations with accused and with deceased were friendly. He roomed on Twelfth street, a short distance north of its intersection by Cedar street. Cedar street runs east and west. Wells street, having the street railway thereon, is one block south of and parallel with Cedar street. Both are crossed by Eleventh, Twelfth, and Thirteenth streets at right angles, numbering from east to west, and No. 1219 Cedar street is on the south side of Cedar street, faces north, and is about midway between Twelfth and Thirteenth streets. Next east of No. 1219 is an alley extending south from Cedar street to Wells street. Between this alley and the Hedger house, beginning at the lot line on Cedar street, is a wooden rail supported by posts, which continues further back as a board fence toward the rear of the Hedger lot. West of this rail and fence and east of the Hedger house and between the house and this rail and fence is a narrow private sidewalk on the Hedger lot which extends from the public sidewalk on Cedar street south to the rear of the house. The front or north door of the Hedger house is near the northeast corner of the house. It is reached only through and inclosed in a storm shed which has but one door, which is on the east side of the storm shed. From this last mentioned door three or four steps lead down to the narrow private sidewalk. It is only six or seven feet from these steps to the rail between the private sidewalk and the alley. Thirty or thirty-five feet further south along this same narrow sidewalk is the side

door to the Hedger residence, which opens into the kitchen. But this kitchen door is also inclosed by a storm shed having one door opening to the east and some steps ascending to it from this private sidewalk. Further south the private sidewalk takes a turn to the west around the southeast corner of the house, and a step or two west from this turn there rise from the walk a few steps which bring one on to the south end of the east porch of the house in which the side storm shed above mentioned is built, and also brings one to another door opening to the south and entering this same east storm shed. These three entrances are called by the witnesses the front, the side, and the rear entrance, but these terms are somewhat misleading. Entering the house by the front or north entrance there is first the storm shed, then the front door, then a hall with a parlor to the west, and south of this parlor a sitting room, east of the latter a dining room, and south of this is the kitchen, which is reached from the north by the door between it and the dining room and from the east by a door opening into the east storm shed. In the second story are bedrooms. East of the Hedger house and across the alley from it is the Omlor residence. West of the Hedger residence and extending from it to Thirteenth street and fronting on the last named street is the Waldeck barn and residence in the order named. South of the Waldeck residence and fronting on Thirteenth street but with its rear extending easterly to the rear of the Hedger lot is the nurse's boarding house occupied by Miss Casey, her domestic aide, and several professional nurses. The rear of the last mentioned house is sixty or seventy feet from the rear of the Hedger residence. The Kennedy flats are on the north side of Cedar street and between Eleventh and Twelfth streets. The significance of the evidence would be lost if these descriptive details were not kept in mind. They have been collected from the evidence and exhibits in this case with some labor.

On the morning of September 9, 1909, the accused and his

wife had breakfast together about 7:30 o'clock. Their breakfast consisted of coffee, rolls, bread, and boiled eggs. After breakfast accused left the house at such time that he would reach the corner of Eleventh and Wells streets, two and one-half squares distant, at 7:49 or 7:50 o'clock. Accused and his wife were the only persons in their house after 7:20 o'clock and up to the time of his leaving, about 7:45 or 7:47 o'clock. There was testimony which the jury had a right to believe, by four persons, two in the Waldeck house and two in the Casey house, that they heard a shot in the direction of the Hedger house at 7:45 o'clock. Some of them also heard following the shot a sound like falling dishes. Much criticism is made on this evidence, but its credibility was for the jury. The accused boarded the street car at the time stated, went down to his place of business, and it is vigorously contended that it has been shown by the testimony of various persons that he remained down town at or in the immediate neighborhood of his place of business all day and did not return to his residence until evening. There is testimony to support that conclusion had the jury so found. But the witness Malcolm McHarg testifies that he saw the accused about 10:30 or 10:45 o'clock in the morning of September 9th at the Kennedy flats in the neighborhood of the residence of the accused, and saluted him. A clerk at the drug store on the corner of Eleventh and Wells streets saw accused pass there at 2:30 p. m., and Mrs. Waldeck and her daughter, the next-door neighbors of the accused, saw him coming from the direction of his residence and passing the Waldeck residence going west on Cedar street toward Thirteenth street at about 2:10 p. m. on the same day. The accused left his place of business, 105 Grand avenue, at 5:30 p. m., and went directly home, and after alighting from the street car at or near the intersection of Eleventh and Wells streets stopped to purchase a bottle of milk and took it home with him, as was his custom. Whether from this point he

went home by going north on Twelfth and west on Cedar street, or north on Thirteenth street and east on Cedar street, or up through the alley mentioned leading from Wells to Cedar street, is not shown. According to his admissions to the officers he did buy this milk on his way home, found the rear (east?) door locked, then set down his bottle of milk and went in the front door. After he entered he was informed by Iver Harrang, whom he first met inside the house, that his wife was on the kitchen floor dead, and he went back to the kitchen and felt of her forehead and hands and found them cold.

A different version of the occurrences at the Hedger residence at this time is given by Harrang. The latter left his rooms on Twelfth street five minutes before 6 o'clock, going south on Twelfth street and west on Cedar street to the Hedger residence with his coffee bottle to get his usual midnight lunch from Mrs. Hedger. He would thus face *Hedger* were the latter approaching Cedar street from Wells on Twelfth street, walk with him or near him were the accused proceeding west on Cedar street at this time, and would face *Hedger* coming east on Cedar street while Harrang was approaching the Hedger residence going west on Cedar street if *Hedger* had come up from Wells street by way of Thirteenth street or any other street west of Thirteenth street. Harrang proceeded west on Cedar street, passed the alley mentioned to the narrow sidewalk which ran by both the front and the side entrances to the Hedger house, considering the storm-shed doors the entrance doors. He turned south on the private sidewalk and went down to the east storm-door entrance and found it locked as *Hedger* had found it. He then observed a milk bottle standing on the porch near this entrance, and inferring from this that the Hedgers were at home he continued a few steps south on this private sidewalk, turned west thereon a step or two, ascended the steps leading therefrom to the porch, and entered the east

storm shed through the south door opening into the same. He saw the mail scattered on the floor inside this door, the kitchen door between the kitchen and this storm shed was open, looked in and saw the body of Mrs. Hedger lying on the kitchen floor, walked in and struck a match and held it over her face, recognized Mrs. Hedger and called out, "Is there anybody at home?" There was no answer, but almost immediately he heard the front door "go," so he walked out through the dining room and met *Mr. Hedger* where the dining room joins the hall and said to him: "Do you know about this, *Mr. Hedger?*" The latter answered: "That is what I am trying to find out," or "That is what I have been trying to find out." On their way back to the kitchen *Hedger* said something about having tried to get a doctor. Both lifted the table from over the body toward the east wall and the accused sat down in a rocking chair by the south window. Mr. Harrang then bent down and put his hand on Mrs. Hedger's wrist and felt that it was cold and hard and said to *Hedger:* "She is gone, *Mr. Hedger,* and she has been gone for some time." Also, noticing the table, said: "It looks as though she has been going to eat." *Hedger* said: "Yes, or trying to prepare a meal for somebody." *Hedger* did not touch the dead body of his wife. The room was rather dark, the shade on the east window was all the way down, and that on the south window was pulled down to about eight or ten inches from the bottom sill. The body lay with the limbs stretched out, hands along the side lying perfectly straight, dress pulled up not quite to the knee, and the lower half of the body under the table. There was a white table-cloth on, a plate, a few slices of bread, a table knife, some butter in a wooden tray, and a cup of coffee. The coffee was covered with a scum and looked as if it had been standing for a long time. Harrang then asked *Hedger:* "Did you get a doctor?" and the latter answered "No." "Did you telephone for one?" and the latter again answered "No." Har-

rang then declared he would go and get one and started out and called up Dr. Tisdale, came back again and went in the side door to the kitchen, and found *Hedger* sitting by the window in the same chair where he was when Harrang left. Then a doctor came, and in a few minutes another doctor and two or three ladies.

The evidence showed that the deceased came to her death by reason of a gunshot wound in the back of the head in such place and taking such direction as to preclude the idea of suicide, and a thirty-two caliber revolver bullet was at the autopsy found imbedded in the brain. There were no powder marks, and no pistol or other firearm could be found in the house after diligent search. There was a wound over the left eyebrow a half an inch or more in length, a quarter of an inch in width, and about a quarter of an inch in depth, but this was not the cause of death. Bureau drawers were pulled open and contents scattered on the floor, but although there was valuable jewelry and silverware in the house none of it was missing. The money which Mrs. Hedger was thought to have was not found. The indications were that the disorder was caused by someone who wished to give the house the appearance of having been burglarized. The accused did not attempt to ascertain whether anything was missing until after the police officers came into the house, when he aided somewhat in the search at their request. He tried to give the impression that there had been a burglary. The body was lying on the kitchen floor, feet to the southeast, head to the northwest with the head in a pool of blood, dressed in a long kimona and night dress, a suit of underwear, black skirt, and pair of stockings. There were no shoes or slippers upon her feet, and the body was removed to the morgue, where an autopsy was held about 10:15 o'clock the night of September 9th. There was found in the stomach a few particles of bread and pieces of white of egg. Of the contents of the stomach three fourths were fluid and one fourth solid.

The pieces of white of egg were unchanged by digestion, the lines of fracture sharply defined with angles intact, on the fractured surfaces the lines of coagulation were visible. From this and other data the doctors were of opinion that the contents of the stomach had been ingested not more than half an hour nor less than fifteen minutes before her death. Because the *rigor mortis* had passed, because of the dryness of the clotted blood, and because of the condition of the contents of the stomach, the doctors were of opinion that Mrs. Hedger had been dead twelve hours before the autopsy.

Evidence was offered bearing upon the demeanor of the accused when he boarded the street car about 7:50 o'clock that morning and also after the discovery of his wife's body, and there is evidence to the effect that at the latter time he cried or moaned, and also evidence going to show that he was not seriously affected, but indulged in jokes while sitting in the house waiting for the body to be removed to the morgue; did not attempt to touch the body of his dead wife or help to remove it, and rather persistently adhered to the theory that there had been a burglary and also to the suggestion that his wife had been probably preparing a meal for some tramp who shot her. Testimony was offered to show that *Hedger* had arrived in the neighborhood of his home shortly before 6 o'clock on the evening of September 9th and had gone to the entrance of the Kennedy flats, thus tending to make it appear that after leaving the bottle of milk on the side porch he had not gone directly to the front door, but had gone to a convenient place from which he could watch for the expected arrival of Harrang, and only entered his house after he had permitted Harrang to discover the body. The accused did not take the stand as a witness, and Harrang and he did not meet at or near the house at 6 o'clock after the accused says he left the bottle of milk on the side porch and proceeded to enter by the front door. No explanation of this is offered. There were circumstances here from which the jury were justified in finding that the accused arrived at

his residence before Harrang arrived, left the bottle of milk there, and did not immediately enter the house, but went somewhere and waited until Harrang had entered the house through the so-called rear entrance. It also appeared that the accused was short of funds, was pressed by his creditors, and was trying to mortgage the homestead to raise money, and that his wife had refused to sign the mortgage. Other facts and circumstances too numerous to be set forth here in detail, but more remote than those above set forth, appeared.

Counsel for the accused challenged the evidence as wholly circumstantial and therefore insufficient to exclude reasonable hypotheses other than the guilt of the accused. They argue that no motive for the murder is shown and the most that the evidence tends to establish is homicide with opportunity on the part of the accused to have committed it. We cannot agree with this argument. For the purpose of upholding the verdict the evidence sufficiently points to the conclusions, first, that a murder was committed; second, that it was committed at about 7:45 a. m. on September 9, 1909, in the Hedger residence, at a time when the accused and his wife were the only persons in that residence, soon after their breakfast, and at the time the shot was heard by the neighbors; third, that the accused was in the neighborhood of or at his house during the day of September 9th and failed to disclose the fact of her death or make any alarm; fourth, that the accused knew of the death of his wife prior to the discovery of her body by Iver Harrang and failed to disclose it. When the jury was satisfied by the evidence of the truth of these four propositions they had established facts and circumstances from which they might lawfully infer the guilt of the accused. *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425, and cases; *Lonergan v. State,* 111 Wis. 453, 87 N. W. 455; *Montgomery v. State,* 128 Wis. 183, 107 N. W. 14; *Prinslow v. State,* 140 Wis. 131, 121 N. W. 637.

The assignments of error relative to the admission and

exclusion of evidence present, first, that the witnesses for the state were permitted to testify relative to the presence in the Hedger home of a bottle of chloroform labeled "Chicago," which was found there by Mrs. Hedger in the absence of the accused. The state attempted to prove what Mrs. Hedger said on finding the bottle, but this was erroneously ruled out on objection of the accused because not said in the presence of the accused. The evidence appears to have been attempted for the purpose of showing the relations between the spouses. But the court ordered the evidence already received stricken out and instructed the jury to disregard it. This power of the court to so rule is essential in the proper conduct of the trial, because it cannot always be seen or known when evidence is admitted whether this evidence can be logically connected with the case against the defendant. The rule of this court on that subject and the cases supporting it will be found in *Hanson v. Johnson,* 141 Wis. 550, 124 N. W. 506. It has not been shown in the case at bar that the accused was prejudiced by the admission of this evidence so far as it was admitted. There was no error in admitting evidence tending to show that the accused was addicted to the use of intoxicating liquor, was frequently intoxicated, and that his health was impaired thereby, nor that he was an eccentric and peculiar man, nor to describe his eccentricities or peculiarities or general deportment. In cases of uxoricide the relation between the spouses prior to the killing is proper to be shown, and, because of their disposition to conceal their differences from third persons and because of the desire sometimes existing to break the bond which has become hateful and yet holds them together, great latitude of inquiry is permitted in such cases. The relations of the spouses prior to the uxoricide becomes an important point of inquiry, and testimony relevant on that subject is admitted even though it tends to show the accused guilty of other offenses. 21 Cyc. 913, 916, 917, 918, and cases. It

is not an answer to this to say that the relations between the accused and his wife were shown to have been ordinarily harmonious. The state had the right to attempt to prove the contrary. Testimony regarding a disagreement between the accused and his wife in 1902 relative to the prosecution of their claim against the estate of Stolla was competent on this ground, but too remote to be of any value. We cannot think the accused was prejudiced by its admission. Over the objection of the accused testimony was received reporting a conversation over the telephone, a short time before the death of Mrs. Hedger, between the latter and one Gottschalk, to whom the accused had applied for a loan of $1,500 to be secured by mortgage on this homestead. Mr. Gottschalk testified that he called up Mrs. Hedger at her house and that someone purporting to be Mrs. Hedger answered and refused to sign the mortgage. He was not acquainted with Mrs. Hedger at the time and did not recognize her voice. But it was further shown that Mr. Gottschalk informed the accused of this conversation by telephone and that the wife of accused refused to sign the mortgage. The accused expressed some disappointment at the refusal and said: "Well then we will have to call it off." The circumstances were strongly corroborative of the fact that this was Mrs. Hedger speaking to Mr. Gottschalk over the telephone, but we do not put the ruling on that ground. The relevant fact to be established was that the accused had been attempting to mortgage the homestead and that he knew his wife refused to sign the mortgage, and these two facts are made to appear by the testimony of Mr. Gottschalk relating to transactions with the accused and by the testimony of Gottschalk that he informed the accused that he had communicated with Mrs. Hedger and that she refused to sign the mortgage. The mortgage was never executed, and whether it was Mrs. Hedger who answered Gottschalk at the telephone from her house or not, the accused was informed that his wife had refused to sign the

mortgage and he acquiesced complainingly in this refusal, and the mortgage was not signed. The testimony was competent for the purpose of showing that the accused had been informed and probably knew that his wife refused to sign the mortgage. The cases cited by the plaintiff in error are not in point. It is not sought to charge Mrs. Hedger with any liability or any blame on account of this conversation over the telephone, but rather to show that her husband was informed that she refused to sign the mortgage, that he was put to some expense thereby and displeased, and he had opportunity, by reason of seeing his wife every evening, to ascertain whether the information given him by Mr. Gottschalk was correct or not. There was no error in permitting the witness Buelow to testify that, some months before the death of Mrs. Hedger, Mr. Harrang lost a revolver while running to a fire near the viaduct upon which he was employed as watchman, and we do not find from the record that he detailed conversations with the person who had broken the revolver by running over it with his automobile. Some slight evidence of this kind slipped in in an answer irresponsive to the question, but it was not persisted in nor called for by the prosecution and was quite immaterial.

It is next urged that the prosecution attempted by suggested questions and a display of rogue's gallery photographs of a private detective named Collins to convey to the jury the idea that Collins was in the employment of the accused at the time of the trial and that there was something dark and reprehensible connected with such employment. We do not find anything in the record to show that any such photograph was displayed to the jury. It certainly was not offered in evidence, and questions on the part of the prosecution to which our attention is called do not support the claim made by the accused. One Rogers was permitted to testify in regard to negotiations between him and the accused subsequent to the death of Mrs. Hedger concerning the sale of

Hedger's real estate in Wauwatosa for the purpose of raising money to enable him to defend this cause. It is said by the attorney general that this testimony was received without objection, and the record seems to bear him out in that statement. The testimony was quite remote and immaterial.

Error is assigned on the admission of the evidence of Mr. Baker, the assistant district attorney, who testified in rebuttal relative to a conversation between him and Harrang. While the accused was putting in his evidence one of his witnesses testified to an interview with Harrang in which the latter appeared concerned and excited over the effect of some evidence given in the case and feared the defendant's counsel would accuse him of the murder. The assistant district attorney testified that Harrang came to the city hall on that occasion at his request, that he was flushed, a little nervous and sick, and that he suggested to Harrang that the counsel for the accused would attempt to use this fact which had been developed to show the probability that Harrang was the guilty person. This was for the purpose of tending to establish that Harrang's anxiety on this point was not suggestive of a guilty conscience, but was the result of what the assistant district attorney had informed him. The evidence of the assistant district attorney was competent upon this point, because, although the state was not required to negative the guilt of Harrang, it might repel by proof any suggestions or impressions made by the testimony on the part of the defense tending in that direction. The error assigned on the testimony of the witness Mohr cannot prevail, because the testimony was stricken out and the jury instructed to disregard it and prejudice to the accused has not been made to appear. *Hanson v. Johnson,* 141 Wis. 550, 124 N. W. 506. There was no error in permitting the witness Omlor to testify to the number of strangers passing through or using the alley directly east of the Hedger house by comparison with the number using other similar alleys. It was within the discretion

of the court to permit the witness Trayser to testify to financial transactions between himself and the accused subsequent to the death of Mrs. Hedger, and although it was quite remote and immaterial it was not incompetent because it tended to show that *Hedger* had money after his arrest. The evidence to the effect that on September 16, 1909, *Hedger* mortgaged his homestead for the purpose of raising money to defray the expenses of his trial was wholly irrelevant and immaterial, but we think not prejudicial; and the same may be said of the testimony relating to conversations between the witnesses Conrad and Mrs. Nicholson as to the duty of every citizen forthwith to report to the police any information which he might have concerning the commission of the crime of murder. It is argued that the trial court erred in permitting the witnesses Miss Gilewski, Miss Casey, Mrs. Waldeck, and Mrs. Marthaler to testify that they remarked at the time of hearing the shot about 7:45 on the morning of September 9th that it was a shot or sounded like a shot. We think this was competent. It served to identify the particular sound referred to by each, to distinguish it from other sounds of the city, and to show that they each had reference to the same sound and had occasion to remember it and to note the time of its occurrence. Precisely the same kind of evidence is held to be admissible in *State v. Sexton,* 147 Mo. 89, 48 S. W. 452. A number of errors are assigned all tending to the proposition that the court refused the accused the right to properly or fully cross-examine certain designated witnesses. We have examined these rulings carefully and find no abuse of discretion on the part of the circuit court. The degree and manner of cross-examination are to a great extent in the discretion of the trial court. Some of the questions proposed on cross-examination were unfair as assuming that the witness said in chief what he had not said. Some of them extended the scope of the cross-examination beyond anything relevant to the examination in

chief, and some were so entirely immaterial that the court was justified in refusing to pursue the investigation further in that direction.

With reference to the exclusion of evidence, the verdict of the coroner's jury was properly excluded as incompetent, irrelevant, and immaterial. *Olwell v. Milwaukee St. R. Co.* 92 Wis. 330, 66 N. W. 362. This particular verdict had no bearing on the controversy before the court. Even if we give it all the solemnity and evidential effect of a judgment of a court of record, yet it merely adjudges that on the 14th day of September, 1909, the coroner and his jury did not know who killed Louise J. Hedger. 3 Wigmore, Ev. § 1671, subd. 6, and cases in note. We find no criminal prosecution in which the verdict was admitted in evidence except *State v. Tate,* 50 La. Ann. 1183, 24 South. 592, where it was admitted to show the fact of a homicide having been committed, and in another case to prove the fact of death; but there are several well-considered criminal cases where the court has refused to admit this kind of evidence, as *Wheeler v. State,* 34 Ohio St. 394; *Colquit v. State,* 107 Tenn. 381, 64 S. W. 713; *Whitehurst v. Comm.* 79 Va. 556.

It is argued that the court excluded the evidence of a witness tending to show that the police officers acted without authority in searching the office of the accused and seizing and removing to the police station his personal property and effects. If the property or papers so seized were attempted to be offered in evidence on the part of the state and objection made on this ground, this kind of testimony would be competent to exclude them, they being otherwise relevant. But there is no such showing; consequently the testimony offered was immaterial to the guilt or innocence of the accused. We perceive no error in excluding the testimony of the witness Mrs. Le Bond nor that of George Vinson. The first was in the nature of a conclusion, and the latter occurred after the witness testified that he knew of no discord between *Hedger*

and his wife, never knew of *Hedger* speaking to his wife in a cross manner, and he was then asked whether he ever knew of *Hedger* in any way showing any want of love and affection for her. The accused was not prejudiced by this ruling. It was not error to exclude the testimony of the witness Gilmore when asked whether he had mistaken the explosion of an automobile engine muffler or tire for the report of a revolver and whether he had known other people to make like mistakes. Other errors are assigned which we have carefully considered, but find no ruling upon evidence which is both erroneous and prejudicial to the accused.

The trial of this cause was begun November 26, 1909, and after selecting a jury which was finally sworn to try the cause the prosecution made an opening statement of the case to the jury and several witnesses were sworn and their testimony given before the jury thus impaneled. While the trial was in progress and before the state rested and on December 6th, the district attorney moved the court to direct a mistrial of the action for the reason that one of the jurors named William Schacht was disqualified to sit in the case on account of having, prior to the time he was called, expressed an opinion on the question of the guilt or innocence of the defendant. The jury was requested to retire and the court made a summary inquiry, brought the juror Schacht into court and examined him concerning the truth of the charges against him, hearing oral evidence on this issue. At the conclusion of this inquiry the court summarily discharged the juror Schacht from further attendance upon the case, sent for the remaining eleven members of the jury and also discharged them, and ordered the drawing and impaneling of a new jury and that the case proceed to trial. Prior to accepting him as a juryman in the case Schacht had been examined under oath with reference to his qualifications and accepted as a juror. The answers that he gave were found by the court to have been false in several important particulars, and it was shown to the

satisfaction of the court that he had discussed this case considerably before being called as a juror, that he had stated that he believed *Hedger* guilty but would never convict him upon circumstantial evidence, and that he had talked with a deputy sheriff and requested that he be summoned as juror. He qualified as a juror on his preliminary examination, and upon the summary investigation he denied much that was charged against him, but the court apparently found against him, and we may assume the fact to be that the juror had prior to the trial both formed and expressed an opinion relative to the guilt or innocence of the accused and stated that he would not convict the accused on circumstantial evidence, which fact he fraudulently and falsely concealed during his examination concerning his qualifications and there gave untrue answers under oath, but also stated that he could fairly and impartially try the case between the state and the accused and was accepted by both the state and the accused as a competent juror.[1] The accused objected to the discharge of the juror Schacht, objected to the discharge of the jury, and when brought to trial before the second jury filed a plea of former jeopardy, which was overruled. To all these rulings he took due exception.

The constitution of Wisconsin (sec. 8, art. I) provides that "no person for the same offense shall be put twice in jeopardy of punishment," in that respect following closely the constitution of the United States (Amendm. V), which reads: "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of punishment." The circuit court here exercised an extraordinary power. The precedents are numerous and strong in favor of the exercise of such power

[1] Immediately after the discharge of the jury on December 6, 1909, an information was filed by the district attorney, charging the juror Schacht with perjury; on December 28, 1909, said Schacht pleaded "guilty," in the municipal court of Milwaukee county; and thereupon he was sentenced to imprisonment in the state prison for a term of three years.—REP.

notwithstanding similar constitutional restrictions. In *Simmons v. U. S.* 142 U. S. 148, 12 Sup. Ct. 171, a jury in a criminal case had been impaneled and sworn, the trial begun, and several witnesses had testified on the part of the prosecution, when it was made to appear to the presiding judge by affidavit that one of the jurors on his *voir dire* examination had falsely sworn that he did not know the accused. The court adjourned for some days, and during the interim counsel for the accused wrote to the district attorney and had published a letter denying the truth of this affidavit and asserting that the affiant had a quarrel of long standing with accused. After hearing the affidavits the presiding judge found it necessary to discharge the present jury to prevent the defeat of the ends of justice and to preserve the rights of the people, and also the right of the accused to be tried by a jury every member of which can render a verdict free from constraint. Against the objection of the accused the jury was discharged, the case came on for trial before another jury, and the presiding judge refused to permit the accused to file a plea in bar on the ground of former jeopardy. To this ruling due exception was taken. The accused was found guilty and sued out a writ of error to the supreme court of the United States. The brief of counsel for the plaintiff in error, a synopsis of which will be found in the report, fully presented all the objections which have occurred to us and which are made in this case against this action of the court below. But the supreme court, on the authority of *U. S. v. Perez,* 9 Wheat. 579; *Winsor v. The Queen,* L. R. 1 Q. B. 289, 290, and *U. S. v. Morris,* 1 Curt. C. C. 23, 27, fully upheld the action of the trial court. See, also, *Thompson v. U. S.* 155 U. S. 271, 15 Sup. Ct. 73. The case of *U. S. v. Perez, supra,* was decided long before the adoption of our state constitution, and the interpretation there placed on the clause in question of the federal constitution was probably

then known and understood. In Michigan a like rule obtains, *In re Ascher,* 130 Mich. 540, 90 N. W. 418, 57 L. R. A. 806; in Kansas, *State v. Hansford,* 76 Kan. 678, 92 Pac. 551, 14 L. R. A. N. S. 548; in North Carolina, *State v. Bell,* 81 N. C. 591; in Massachusetts, *Comm. v. McCormick,* 130 Mass. 61. Other cases are cited in 14 L. R. A. N. S. 548 *et seq.* See, also, *People v. Sharp* (Mich.) 127 N. W. 758. When a juror has fraudulently and falsely concealed his disqualification and it is first discovered after the trial has begun, the power of the court to discharge the jury of which this disqualified juror is a member and begin the trial anew before another jury seems to be placed on the ground of absolute necessity, like the case of sickness or death of a juror or of the presiding judge. That is to say, it is absolutely necessary to discharge the first jury and begin anew in order to have a trial of the cause which is a trial and not a mere farce. This power of the circuit court is not to be lightly exercised. The state cannot for its own convenience, or in discretion, discontinue the prosecution and still hold the prisoner for trial. The power is not to be exercised except in cases in which the law recognizes and points out the necessity for such action. Within the authorities above cited the instant case was one of necessity in this respect. The rulings of the circuit court in discharging the first jury and overruling the plea of former jeopardy are approved.

It is argued that the court below erred in sustaining the challenge of the prosecution to the juror Oscar Cease. An examination of the testimony given by this juror respecting his qualifications convinces us that there was some evidence to support this ruling. The evidence is not clear or satisfactory, but the matter was one resting largely in the discretion of the trial court. That court, acting within its jurisdiction, has found as matter of fact by such ruling that the juror was not impartial. That finding is under these cir-

cumstances conclusive upon us. *Baker v. State*, 88 Wis. 140, 59 N. W. 570; *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477.

Numerous exceptions are taken to the instructions given to the jury and to the refusal of instructions requested by accused. The instructions begin with a series of abstract propositions defining murder, intent, and malice, and the jury was informed that these definitions and instructions on the elements of the crime of murder in the first degree would enable them to proceed to the consideration of the questions in the case. The question for determination is then stated, and then the nature and requisites of circumstantial evidence. The rule requiring the jury to be convinced beyond a reasonable doubt is extensively set forth, explained, and applied to the evidence in the case. The instructions then treat of the evidential quality of motive, the duty of the jury to reconcile, if possible, any apparent conflict in the testimony of witnesses, the value of expert or opinion evidence, and the evidential value of good reputation or good character. The instructions then recur to the question of intention or premeditated design, apply the rule of reasonable doubt to this, caution the jury against statements of attorneys made in argument and not supported by evidence and against considering offers of proof or testimony stricken out by the court, and again explains and defines reasonable doubt. It is said there is error in the following excerpt from the first described portion of the instructions:

"Hence when a homicide occurs and the circumstances are absent which would excuse or justify the act or reduce it to manslaughter, the law implies malice, and such killing would be murder."

This is an abstract statement, applies to all degrees of murder, and merely sums up to the jury the rule of sec. 4365, Stats. (1898). In the same portion of the instructions the court said:

"The law presumes that every reasonable person intends all of the natural, usual, and probable consequences of his acts, and when one person assaults another violently with a dangerous weapon, likely to kill, not in self-defense, not in sudden heat of passion caused by provocation apparently sufficient to make passion irresistible or involuntary, and the life of the party thus assaulted is taken in consequence of such assault, then the legal and natural presumption is that death was intended, and in such case the law implies malice, and such killing would be murder. The foregoing definitions and instructions on the elements of the crime of murder in the first degree, charged by the information, will enable you to proceed to the consideration of the questions in this case."

From another portion of the charge the following excerpt is challenged by exception:

"In determining this question you will bear in mind and apply the instructions already given you, together with the following: 'The premeditated design of murder in the first degree is simply an intent to kill.' "

Then occur these words not excepted to:

"Design means intent, and both words essentially imply premeditation. The premeditation of the statute does not exclude sudden intent. Intent to kill means just what the ordinary signification of the word suggests."

The next following matter is excepted to:

"Whether it be described by the words 'actual intent,' 'design,' or 'premeditated design,' makes no difference. In other words, the intent is understood to be premeditated or thought of because without mental action the purpose could not be formed. When there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was intentional and malicious, and was prompted and determined on by the ordinary natural operations of the mind. In the absence of evidence to the contrary, he who takes the life of another by the infliction of a wound or some act naturally and probably calculated to produce death, is presumed to have intended that result and to be guilty of

murder at the common law, and murder in the first degree under our statute. From the circumstances of the taking of the life of a human being by the act of another, naturally and probably calculated to cause that result, the law presumes that such person, when he perpetrated the act, foresaw and intended the result which followed, hence must be guilty of the highest offense of criminal homicide known to our law, in the absence of evidence showing that the homicide was justifiable or excusable or sufficiently rebutting the presumption of intent to take human life so as to raise a reasonable doubt on the question. That must be so, since under our statute every intentional taking of human life, not excusable or justifiable, is murder in the first degree. When it is made to appear in the prosecution of a case like this that the accused fired the shot, the weapon being aimed at a vital part of the body, and that death ensued as a natural and probable result, the presumption of fact as to the intention to take human life, in the absence of any explanatory circumstances or evidence, makes a *prima facie* case for the prosecution. The state is not bound to go further and negative any probability that the occurrence was the result of accident, or that there were other circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it altogether," etc.

We take it to be apparent that the court below was here first discussing implied malice but later actual intent. These paragraphs of the charge are not grouped together in the charge as given as they appear above. A homicide committed under such circumstances that the law implies malice is not always murder in the first degree, but it is such where there exists at the time on the part of the accused a premeditated design to effect the death of the person killed or of any human being, and this premeditated design may be proven as stated in these instructions. We do not understand the charge to declare that murder in the first degree under our statutes, and murder at common law, are one and the same thing. A case may be presented which would fall under both. The accused was on trial for the statutory homicide, and how nearly this covered or included the common-law

crime of murder could be only of professional or academic interest. The charge must be tested in view of the questions before the court arising upon the information and evidence, and not academically or by contrast with the whole body of the law relating to homicide. Thus construed there is nothing in the charge in conflict with the rules laid down in *Hogan v. State,* 36 Wis. 226; *Perugi v. State,* 104 Wis. 230, 80 N. W. 593, or *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

The next exception challenges the instructions upon the ground that they deprived the accused of the benefit of reasonable doubt arising from insufficiency or lack of evidence, and certain excerpts are presented which are thought to bear that construction, because the trial court therein stated that a reasonable doubt which entitles an accused person to an acquittal is the doubt of guilt reasonably arising from all the evidence in the case. It would be quite a technical and narrow construction of this language to hold that it excluded the right of the accused to an acquittal by reason of reasonable doubts arising from lack of evidence; but the court also said on this subject:

"This reasonable doubt that has been spoken of, this reasonable doubt which is found in the law, must be a reasonable doubt, a rational doubt, a doubt fairly arising upon the testimony and the circumstances surrounding the case." Also: "The burden of proof is upon the state to satisfy you beyond a reasonable doubt of the existence of every fact and circumstance necessary to form a conclusion of the guilt of the defendant, and this burden of proof does not shift to the defendant at any time. . . . His guilt must be affirmatively proven to a moral certainty. . . . The presumption of innocence attends the accused from the beginning to the end of the trial, and prevails, unless overcome by evidence sufficiently strong to convince and to satisfy you of the defendant's guilt beyond a reasonable doubt."

We think this subject was sufficiently covered by the charge as given, and the exception mentioned, together with the ex-

ception to the refusal to charge on this point, must therefore be overruled.

Exception is taken to the italicised portion of the following:

"Motive for the killing is an important fact in a trial for murder, and particularly so when the charge is sought to be maintained solely by circumstantial evidence. If upon a review of the whole evidence no motive is apparent, or can be fairly imputed to the accused in the commission of the crime charged against him, then this is a circumstance in favor of innocence and should be so considered by you. You have heard various theories advanced by the respective counsel in the case which they claim are based and founded upon evidence. But it is for you to determine from all the evidence in the case whether or not any adequate motive, or motive of any kind, existed for the commission of the crime charged against the defendant in this information. *But, gentlemen, motive is not essential in such a case. Presence or absence of it is an evidentiary circumstance merely bearing, with more or less weight according to the circumstances, on the question of guilt.* I also charge you, gentlemen of the jury, that it is an admitted fact in this case that the deceased was the wife of the defendant, and that the presumption that she was not killed by her husband, or that the killing was not done with malice aforethought, is very strong."

While the foregoing cannot be considered a model in this respect, we find no prejudicial error therein. On the whole it seems to be a substantially correct exposition of the law. *Spick v. State,* 140 Wis. 104, 121 N. W. 664; 12 Cyc. 149.

Exception was taken to the following:

"I also instruct you that if there be a conflict of testimony of the witnesses called, the presumption is that either one or the other of the witnesses may be honestly mistaken rather than that either wilfully testified falsely."

Technically speaking this is not a presumption of law, but the meaning of the court is apparent and the effect not misleading. *Petrich v. Union,* 117 Wis. 46, 93 N. W. 819. It

is equivalent to telling the jury that the theory of honest mistake should be adopted presumably rather than the theory of wilfully false swearing. We are inclined to the belief that this portion of the charge was rather favorable to the accused than otherwise.

Further exception is taken to the following:

"There has been considerable testimony in this case given by experts, and many questions were put and answered upon a hypothetical state of facts. In weighing the answers to such questions it is important for you to keep in mind the facts which were stated in such questions upon which said experts were called to give their opinions. If such facts were not in material respects the same as you find them to exist, after consideration, in this case, such opinions would be necessarily weak, if not valueless."

This was correct. It is a proper instruction with reference to hypothetical expert opinions.

Exception is taken to the following: "Evidence of good reputation or good character does, however, not constitute a defense." Standing alone this might be subject to criticism as misleading. Whether it was correct or not depends upon what is meant by the word "defense." Certainly one could not justify a criminal act or defeat a criminal prosecution on the sole ground that he was a person of good character. But the whole instruction on this point was as follows, and was not erroneous or misleading within the rule of *Niezorawski v. State,* 131 Wis. 166, 111 N. W. 250, and *Schutz v. State,* 125 Wis. 452, 104 N. W. 90, and cases there cited:

"You are instructed that evidence of good character or reputation of the defendant for being a peaceable and quiet citizen is admitted for the purpose of leading the jury to believe that the accused is not likely to have committed the crime charged against him. In a case depending entirely upon circumstantial evidence, where in addition the testimony for and against the accused is in conflict, it may become very important. Evidence of good reputation or good character does, however, not constitute a defense. It is en-

titled to all the consideration you think proper to give it under all the circumstances of the case. The fact of good character or good reputation is of no significance in any case in the face of satisfactory evidence of guilt in the judgment of the jury after giving due weight to such previous character and reputation. If the jury believes, from the evidence, beyond a reasonable doubt, that the accused committed the offense charged against him, it is their duty to convict though they believe that prior to the commission of the offense his character and reputation were inconsistent with such commission. You are further instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with defendant's innocence, you should do so and in that case acquit the defendant."

Taking the charge on this subject all together it becomes very apparent in what sense the court used, and the jury probably understood, the word "defense." The evidence of good character is not minimized by the whole instruction, but we think fairly submitted to the jury with the other facts in the case. No error was committed in cautioning the jury against statements or arguments by the attorneys for the prosecution which had no support in the evidence, although this is made a point of exception.

The following unfortunate expression is also made the subject of exception: "Unless the evidence fails to impress your minds beyond a reasonable doubt of the defendant's guilt you should acquit him." If double negatives were always understood by ordinary people as they are by grammarians to express an affirmative, this statement in the charge might be both incorrect and prejudicial; but they are not always so understood, and in view of the many times that the court in the same charge stated this same proposition correctly, we think the jury was not misled nor the defendant prejudiced by this slip of the tongue. *Dillon v. State,* 137 Wis. 655, 119 N. W. 352.

The remaining exceptions are very numerous and were taken to alleged improper and prejudicial remarks made by

the attorneys for the prosecution in their opening statement, during the trial, and upon the argument, and also to alleged improper and prejudicial remarks made by the circuit judge in the presence and hearing of the jury during the progress of the trial. We have examined them carefully, but in view of the number of points already gone over in detail and consequent inordinate length of this opinion we overrule all such exceptions without discussion, except to say that the trial court instructed the jury to disregard these remarks at the time they were made and also in his instructions to the jury. On the part of the prosecution, zeal seems to have somewhat outrun discretion, and eloquence to have broken away from the restraint of facts, but not to such extent as to affect the verdict or warrant a reversal of the judgment in a case like this in which the learned trial judge, by his conduct of the trial and his rulings, corrected any errors in this regard so that the accused was not prejudiced thereby. The exceptions taken to remarks made by the circuit court in the presence of the jury are not well taken. We find nothing in these remarks either improper or prejudicial to the accused. Another set of exceptions was taken to rulings of the trial court in refusing to strike out evidence. These have been covered by what has been said relative to the admission and exclusion of evidence. They have been examined and considered and in the judgment of the court must be overruled.

Overruling a motion for a new trial on the ground of newly discovered evidence, the learned trial judge said:

"I find it to be the court's duty to deny the motion. The evidence has convinced me that the story related by the witness Braeutigam, as to what he states to have seen and heard in front of the defendant *Hedger's* home on September 9, 1909, has no truth in it. In fact I do not believe that this man Braeutigam ever went near the Hedger home on that morning. It is either an entire fabrication, or due to delusion, or arising from both. While it may be due to delusion or abnormal condition of mind, I believe it is a story

fabricated by the witness Braeutigam for the purpose of obtaining notoriety, or perhaps is loose, careless, and irresponsible talk, without recognizing its possible consequences, spread among his friends and acquaintances, but which he, when called upon to verify or deny, had not the moral courage to deny because he feared it would expose him to the ridicule of his friends. His moral sense is of so low an order, as has been shown upon this hearing, and so weak that it did not deter him from repeating that story in court, though placed under oath. In fact, I came to the conclusion while listening to this testimony that the witness Braeutigam did not seem to understand or be impressed by the importance of the oath at all. . . . I am also of the opinion that no better estimate of his said testimony would be given by any jury of ordinarily intelligent men who might be called upon to try the defendant's case if a new trial should ever take place. I am convinced that if a new trial of defendant's case should be ordered, the testimony of this man Braeutigam, in the face of all the other evidence heretofore given in that case and in conjunction therewith, will not tend to change the result of the case; that there is no probability, in case of a new trial, that a jury of honest and ordinarily intelligent men with that testimony in the case will ever agree upon a verdict different from the one rendered."

Is this decision warranted by the showing for a new trial? The newly discovered evidence was that of a witness named Braeutigam. His testimony is that on the morning of September 9, 1909, he left his home at 1314 Cold Spring avenue about 8 o'clock, going down town by way of Thirteenth and Cedar streets, and that shortly after 8 o'clock, when he was on the north side of Cedar street and fifteen or twenty feet east of Thirteenth street and about opposite the Waldeck residence, he heard a shot and saw a man come out of the front door of the Hedger home. This man he describes as a tall man, smooth shaven, and having a yellow or sallow complexion. The man jumped over the rail into the alley and joined another man who had been apparently waiting at the Cedar-street entrance to the alley, and both proceeded south

through the alley toward Wells street. He met and recognized the first mentioned man several days thereafter on one of the down-town streets. He informed his wife and daughter and some intimates of this on the evening of the 10th, told his daughter that the man coming out of the house looked excited and pale, and informed several people that he was on his way down town to buy some brushes when he heard the shot and saw these men. His testimony is full of contradictions and absurdities. A man coming out of the front door of the Hedger house, crossing the narrow sidewalk and jumping over the rail into the alley, and then proceeding southward, could not be recognized, identified, or described by one standing where Braeutigam says he was. This is a fact of common knowledge. It may be demonstrated by looking across a street of ordinary width at some one on the opposite sidewalk going in the same direction and about 100 feet ahead. But in the case at bar there was the storm house interposed between Braeutigam and this alleged person during part of the exit of the latter, and there were only two or three strides at most to bring this person to the rail, and after he jumped over the rail and proceeded down the alley his back was turned to Braeutigam. Notwithstanding this the witness testifies that the man was smooth shaven, that his complexion was yellow or sallow, and claims he met and recognized the person in another part of the city several days later. When his daughter read the account of the murder in the newspaper he said to her: "Those two I know well. I know the murderer also." This was quite an extravagant statement for a man who had only such opportunities for examination to make, and this seems to be the first time he mentioned it. He also said that his wife and friend Schimmel advised him not to mix up in the matter or tell his story to the police. Also that he went to the city hall and tried to give information in the beginning of December, 1909, and was at the city hall eight or ten times in the fall of 1909;

that he told one or more policemen about it, but they deny that he had done so; that he never was back to the Hedger house since; that he was back to the Hedger house the day before he made this statement and also on the 13th of September, 1909, with Schimmel; that he was going down town to transact business, to buy brushes, at the time he heard this shot, that is what he started for, and several witnesses to whom he told the story testify that he said to them this was his errand. He was not going to buy brushes, he told that to fool his wife; but he had an appointment with one Frank Franz or Franz Frank, who said he lived on Center street but who could not be found in the city. He had seen Frank three or four or five times before that, but did not know where they were going to meet down town. There was no place of meeting fixed. He then shifted his ground and said he was going down town for amusement, but would rather die than have his wife know it. This amusement consisted of a grind organ. Reminded of the improbability of his statement that he would rather die than have his wife know he was going down town to hear a hand organ he said his object was a grind organ, a few ladies, and some nonsense, and that if he made a side spring he does not tell his wife. He never saw this man Frank since. He dictated to his nineteen-year-old daughter or requested her to write letters of an exceedingly obscene character. At one time he stated that he told the story of hearing this shot and seeing the man leave the Hedger residence and jump into the alley to 200 people; that when a crowd gathered he would tell it. He later testified that he said this because "it was to laugh" because they did not want to believe him. Being reminded that four persons had testified that the only shot heard in that neighborhood that day was fired at twenty minutes to 8 o'clock in the morning, he said he either must swear false or they must swear false. It was suggested to him by question that he might be mistaken and he answered: "Yes, you were

right; my clock goes sometimes an hour fast, so that I may be from three quarters to one hour mistaken. I do not claim that that man shot her; *Hedger* may be the man still. I do not swear that I saw him go out of the door, I saw him go over the fence." He also testified: "I saw him come out of the storm door. . . . I said he came out of the door, but I don't claim that he came out of the storm door. What kind of a door is that in that front house?" It is quite manifest that the witness did not at this time remember that the front entrance was only through a storm shed and that the door of the storm shed was on the east side of it, thus partially excluding the man from his view. He also contradicted himself with reference to the place of meeting this man several days later, with reference to his object in going down town on that day as well as on September 9th, with reference to the persons to whom he told the story, with reference to what he told them, and in other respects. Five physicians were appointed by the court to inquire and report concerning his sanity. Two of them found him insane, two sane, and the fifth found that he had mental defects "of such a character that affect his intelligence, his moral sense, his memory, his relations to his surroundings and his judgment, vitiating them all relatively and correspondingly invalidating his statements." He was contradicted on material points by several witnesses with respect to his past history and also with respect to his whereabouts in the forenoon of September 9, 1909. Some workmen who knew him and worked with him described his doings and considered him "nutty." Some years before, the district attorney, under the belief that Braeutigam was mentally unsound, refused to prosecute him for challenging a man to fight a duel. In short, his sanity, his veracity, and his general character were impeached by himself and by others. This condition justified the circuit court in denying the motion for a new trial on the grounds stated by that court and hereinbefore quoted. *Conradt v.*

Sixbee, 21 Wis. 383; *Loucheine v. Strouse,* 49 Wis. 623, 6 N. W. 360; *Keeley v. Great Northern R. Co.* 139 Wis. 448, 121 N. W. 167; *Goldsworthy v. Linden,* 75 Wis. 24, 43 N. W. 656; *Mueller v. Pew,* 127 Wis. 288, 106 N. W. 840; *Anderson v. Arpin H. L. Co.* 131 Wis. 34, 110 N. W. 788; 12 Cyc. 738, 739.

The accused has been represented by able counsel who have diligently presented his cause in this court and in the court below and apparently have left nothing undone in the discharge of their duty toward their client. But the accused has, in our opinion, had a full and fair trial according to law. In such a long trial in a hotly contested case some irregularities are inevitable. Perfection is unattainable. We are however convinced that no substantial error prejudicial to the accused or calling for a reversal of this judgment has been committed, hence the judgment and order denying a new trial must be affirmed.

By the Court.—Judgment and order affirmed.

A motion for a rehearing was denied January 10, 1911.

GERMAN AMERICAN BANK, Respondent, vs. WEBSTER MANUFACTURING COMPANY, Appellant.

October 5, 1910—January 10, 1911.

Logs and timber: Sale: Entire contract: Part performance: Time for delivery: Breach by vendee.

1. A contract for the sale and delivery of all standing timber on certain lands at specified prices provided that $5 per thousand feet should be paid on the 15th of each month for all logs skidded during the prior month; that a second payment at a certain rate per thousand feet should be made each week for logs loaded on cars during the previous week; that delivery of all logs which should be logged in each of two seasons should be completed on

or before May 1st in each year; and that "as soon as all logs shall have been delivered and received" by the vendee "settlement shall be made for the balance due," the vendee having an option to give its notes for such balance. The parties made a settlement for the logs delivered during the first season. *Held*, that the contract was not entire but apportionable, and that delivery of all the logs was not a condition precedent to the vendors' right to enforce payment for those actually delivered during the second season.

2. The contract not requiring all the logs to be delivered by May 1st in the second season, the vendors had a reasonable time after that date to deliver the logs not theretofore logged.

3. Breaches of the contract by the vendee in failing and refusing to make the stipulated payments and settlement gave the vendors a right to treat the contract as terminated and to dispose of the undelivered logs and uncut timber in some other way.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an action to recover an amount alleged to be due from the defendant company on a contract made between it and Fay L. Cusick & Co. The plaintiff seeks to enforce a lien held by it on timber embraced in the contract. By the contract Fay L. Cusick & Co. sold to the defendant about 3,000,000 feet of oak saw logs and about 1,000,000 feet of other saw logs, intending thereby to sell and deliver all the standing timber owned and controlled by Fay L. Cusick & Co. on the premises specified in Bayfield county. The contract price to be paid by the defendant to Fay L. Cusick & Co. was $23.75 per thousand feet (log measure) for oak logs and $12 per thousand feet (log measure) for all other logs. Payment was to be made as follows: $5 per thousand on the 15th of each month for all logs skidded during the prior month, the second payment to be made on Thursday of each week at the rate of $10 and $5 per thousand, respectively, for oak or other logs loaded on cars at stations specified in the contract during the previous week, pursuant to statements furnished to defendant showing the number of cars and giving statements with the number of pieces in each car. Fay L. Cusick & Co.

agreed to load the cars and consign the logs to the defendant at Superior, Wisconsin. It was agreed that:

"Delivery of all said logs which shall be logged during the season of 1906–7 shall be completed on or before May 1st, 1907, and delivery of all of said logs which are logged during the season of 1907–8 shall be completed on or before May 1st, 1908, and no more than eight (8) cars shall be shipped in any one day."

It was further agreed: "As soon as all logs shall have been delivered and received by the party of the second part, settlement shall be made for the balance due," the defendant having an option to settle for the balance by notes due in four to six months.

It appears that Fay L. Cusick & Co. logged, shipped, and delivered a part of this timber to the defendant during the season of 1906–7. The jury found that settlement had been made for this between the parties in the summer of 1907. In September, 1907, Olson & Carlson acquired by transfer from Fay L. Cusick & Co. the property in the remaining timber, and through assignment of the contract assumed its obligations, and later in the year, by agreement with the defendant, made some modifications of the contract, which, however, are not involved in the disputed issues here. Olson & Carlson proceeded to execute the contract, and during the logging season of 1907–8 delivered to the defendant before May 1, 1908, a large quantity of logs, on which there remained unpaid on May 1, 1908, the sum of $6,217.72. The plaintiff bank has obtained assignments from Fay L. Cusick & Co. and Olson & Carlson of this alleged unpaid amount for delivered logs.

It is shown that owing to the winter season of 1908 being unfavorable for logging and shipping, Olson & Carlson did not get all the lumber cut and logged, and about 400,000 feet of logs which were cut and skidded were left in the woods. It appears that defendants refused payment for this or any

amount for the logs delivered before May 1, 1908, upon the ground that the contract called for delivery of all the logs embraced in the contract of the sale of the timber by May 1, 1908. At an interview between the defendant's president and Olson about June 1, 1908, and repeatedly thereafter, the president declined to make payment of any unpaid balance for logs received by them, because he claimed there was a provision in the contract that all logs were to be delivered on or before May 1, 1908. It also appears that in these negotiations and communications between the defendant's president and Olson & Carlson and their representatives in the month of June, 1908, and continuing into the month of September, the defendant persistently refused payment of the balance on the logs delivered, and refused to pay the contract price for the undelivered oak logs.

The plaintiff claims the right to recover the unpaid balance on the logs actually delivered to the defendant. The defendant denies this liability, and alleges by way of answer that the contract was breached by failure of the vendors of the timber to deliver the logs as required during the season of 1906–7 and 1907–8; that no settlement was made for the breaches of the contract before August 1, 1907; that the contract is not apportionable, and requires that all logs covered by the contract be delivered on or before May 1, 1908. It is further alleged by way of counterclaim that it was damaged by the vendors' defaults and breaches of contract, and recovery is demanded.

The case was tried before the court and a jury. After the testimony had been closed the court held that there was a balance unpaid on the logs delivered to defendant of $6,207.72, and submitted the case to the jury on other issues, and the jury found that the parties to the contract had settled up to May 1, 1907, for the logs and all damages, if any were sustained by the defendant, under the contract, and that defendant sustained no damages because the logs were not in fact

all delivered by May 1, 1908. Upon the verdict plaintiff was awarded a judgment to recover the amount of $6,207.72, with interest and costs. This is an appeal from such judgment by defendant.

H. V. Gard, for the appellant.

Edgar L. Wood, attorney, and *W. R. Foley,* of counsel, for the respondent.

The following opinion was filed October 25, 1910:

SIEBECKER, J. The appellant's first contention is that the court erred in holding the contract apportionable, thereby making defendant liable to pay for the logs actually delivered without requiring the vendors to deliver all of the logs as a condition to enforce payment of the balance of the purchase price for those delivered prior to May 1, 1908. True, the parties made a sale of all the timber on the specified lands, but the contract does not specify that delivery of all the logs should be made before payment should be made for those actually delivered. The subject matter of the contract is in its nature readily severable, and was so treated in fixing part payment for the logs as the work progressed. The parties thus apportioned the consideration in conformity to the actual execution of the contract. That the parties intended to apportion it is also evidenced by their conduct in paying for the logs actually delivered the first season, and by settling their mutual claims arising as to those delivered during the first logging season. *Kerslake v. McInnis,* 113 Wis. 659, 89 N. W. 895; *Badger State L. Co. v. G. W. Jones L. Co.* 140 Wis. 73, 121 N. W. 933; *Malueg v. Hatten L. Co.* 140 Wis. 381, 122 N. W. 1057; *National K. Co. v. Bouton & Germain Co.* 141 Wis. 63, 123 N. W. 624.

It is urged that the provisions of the contract providing that, "as soon as all logs shall have been delivered and received by the defendant, settlement shall be made for the balance due," and requiring the vendors to accept defendant's notes

in payment, evinces an intent that the contract was to be treated as an entire one. This in no way negatives the apportionable nature of the contract. It was evidently inserted to fix a time and to compel the defendant to make a speedy final settlement when the contract was wholly executed, and to provide that the vendors should accept defendant's notes in place of a cash payment.

Nor does the stipulation in the contract providing that delivery of all the logs which were logged each season should be completed by May 1st support defendant's contention that the contract was not severable. There is nothing in this provision showing that payment for the logs embraced in the contract was conditioned upon the delivery of all of them. The ruling of the trial court, holding the contract severable, was correct, and the contract was properly enforced against defendant.

In this situation of the case the question arises: Were the vendors of the timber in default under the contract on May 1, 1908, because they had not delivered all of the logs embraced in the contract and had not shipped all the logs that were skidded and left in the woods? As to the skidded logs left in the woods, the contract required that defendant pay to the vendors the sum of $5 per thousand feet on the 15th of each month for all logs skidded the prior month. This the defendant failed to do by May 1, 1908. The defendant evidently refused this payment for the reason that its officers considered the other party in default in not delivering all of the logs embraced in the contract by the 1st of May. The provisions of the contract, however, do not require delivery of all of the logs by May 1, 1908; it only specified that all logs logged in the season of 1907–8 should be so delivered. From these conditions of the sale it follows that the vendors had a reasonable time after May 1, 1908, to complete the delivery of the logs not theretofore logged. From the facts shown, therefore, it appears that the vendors had not breached the agreement

prior to the 1st of May, 1908, as claimed by the defendant, and that they had reasonable time to perform thereafter.

It is well established that the defendant was in default from and after May 1, 1908, in two particulars: First, by its failure to pay the $5 per thousand on the 15th of each month for all logs skidded during the prior month; and, secondly, by its refusal to pay the balance due on the logs actually delivered on or before May 1, 1908. These breaches by the defendant gave the vendors the right to consider the contract terminated and to dispose of the undelivered logs and uncut timber in some other way. We think the record clearly sustains the claim that defendant was in default throughout the negotiations up to the month of September; that the vendors were then freed from their obligation; and that the defendant was in no position to claim damages from plaintiff's assignors. All the alleged detailed errors appertaining to the trial of this issue regarding such damages become immaterial and need not be considered.

The appellant contends that the court erred in submitting question No. 2 of the special verdict, embracing the inquiry as to whether the parties settled any damages defendant claimed to have suffered for alleged breaches of the contract during the first season. The facts and circumstances shown by the evidence on this subject showed a conflict between the parties, and warranted the jury in inferring that a complete settlement had been made by them.

We discover no reversible error in the record, and the judgment should be sustained.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

A motion for a rehearing was denied January 10, 1911.

THERESA VILLAGE MUTUAL FIRE INSURANCE COMPANY and others, Respondents, vs. WISCONSIN CENTRAL RAILWAY COMPANY, imp., Appellant.

October 8, 1910—January 10, 1911.

Railroads: Fire set by locomotive: Negligence: Piling wood near track: Destruction of neighboring property: Proximate cause: Notice of claim by insurance companies as subrogees: Evidence: Objections: Improper conduct of counsel: Harmless errors: Change of venue: Discretion: Taxation of costs.

1. A finding by the jury that a fire which started in dry wood piled upon defendant's right of way was caused by sparks from an engine which had passed a short time before, is *held* to be sustained by evidence which justified the rejection of all other alleged causes and tended to show, among other things, that such engines, even when free from defects and properly managed, did commonly emit sparks, although no witness testified to having seen sparks lodge at the place where the fire was first observed.
2. A railway company which as a common carrier is obligated to receive and transport firewood must conduct such business with a degree of care commensurate with the resulting dangers and hazards to the property of others from fire.
3. Upon evidence in this case showing that a very large quantity of wood had been piled on defendant's right of way, so near the track that sparks from passing engines were likely to fall upon it; that private buildings were so near as to be in danger of being destroyed if the wood should be burned; and that the wood had remained there for a long time in a dry and windy season and was in a very inflammable condition, highly susceptible to ignition from sparks, the jury were justified in finding that defendant was negligent in permitting the wood to remain at such place and in such condition. BARNES, MARSHALL, and VINJE, JJ., dissent.
4. Negligence of a railway company in permitting highly inflammable firewood to remain upon its right of way was the proximate cause of the destruction of neighboring property by a fire which was started in the wood by sparks from an engine, where the danger to such property from a burning of the wood was obvious.
5. The notice of a claim for damage to property by fire which must be given to a railway company before an action can be main-

tained and which, under the terms of sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307), is to be "signed by the party owning such property . . . his agent or attorney," may be signed by the assignee or subrogee of the original owner, or by an agent or attorney.

6. Insurance companies which have paid to the original owner the amount of loss on property damaged or destroyed by a fire set by a locomotive are subrogees of such owner and may give the notice prescribed by sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307).
7. When the object of evidence is plainly indicated by the questions propounded to a witness, and no objection to them is made, a motion to strike out the testimony comes too late.
8. Improper conduct or remarks of counsel during a jury trial, not appearing to have had a prejudicial effect, are not ground for reversal of the judgment.
9. Trial courts are vested with a large discretion in passing upon applications, under subd. 2, sec. 2622, Stats. (1898), for change of venue on the ground that an impartial trial cannot be had in the county.
10. Under the third paragraph of sec. 2921, Stats. (1898), costs may be taxed for notices given under sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307).
11. Disbursements for sheriff's fees for serving summons may be allowed in the taxation of costs, although not itemized in the bill.
12. Although the depositions of witnesses had previously been taken, fees for their travel and attendance at the trial were properly allowed and taxed, fees for attendance at the taking of the depositions being disallowed.

APPEAL from a judgment of the circuit court for Dodge county: E. RAY STEVENS, Judge. *Affirmed.*

This is an action to recover the amount of insurance paid by the plaintiffs to Emma Frederich, whose property is alleged to have been destroyed by fire on May 18, 1906, through the negligence of defendant.

The defendant has a right of way and depot grounds which is 200 feet wide, extending through the village of Auburndale, the track being in the center thereof. Through the village the tracks are almost level, but west of it there is an up grade. The depot is on the north side of the tracks, which

run in a northwesterly and southeasterly direction. Immediately north of the right of way is Connor street, sixty-six feet wide, the principal street of the village. On the north side of Connor street is the only sidewalk on the street. This walk lies in front of the row of buildings which constitute the business portion of the village. Northwest of the depot building and across Connor street from it was, on May 18, 1906, a store building owned and occupied by Mrs. Emma Frederich. Beginning at a line about 400 feet west of the depot building, the piece of ground 75 feet wide and about 277 feet long, lying between Connor street and the track, was leveled and used by the Connor Company for piling wood preparatory to its shipment on the railroad. The village school grounds were across Connor street northwest of this piece of ground, the school building being about 400 feet from it. About half a mile west of the depot and north of defendant's right of way was a sawmill owned by the Connor Company. The Connor Company also owned a general store on Connor street east of the depot building, and had a lime-house near the west end of the ground used for piling wood.

During the winter prior to May 18, 1906, the Connor Company had accumulated between 1,200 and 1,500 cords of wood, and on May 18, 1906, had piled upon the ground used for that purpose upwards of 1,000 cords of wood. About one third of the wood was hard maple and birch, the rest being kiln wood. The kiln wood was cut from dead and down timber, pine, hemlock, and other soft wood, and is described as partially decayed, punky, the bark loose, and the surface rough and fuzzy. It was very dry, the previous several weeks having been unusually dry. The wood was all of cord-wood length and was placed in piles from six to eight feet in height, about 150 feet in length, two or three piles being placed together with passageways between them. The wood was ready for shipment, and during the two months prior to May 18, 1906, about 200 cords had been shipped out, about

twenty cords during the four weeks previous to that date. The Connor Company, as a protection in case of fire, a few days before May 18, 1906, placed twelve or fifteen barrels of water about among the woodpiles. On the morning of May 18, 1906, between 11:35 and 11:55 a. m., fire was observed near the center of the piles of wood. It spread very rapidly, driven by a strong southwesterly wind, destroyed the piles of wood, and was communicated to the buildings, destroyed most of them, and Mrs. Emma Frederich's store was also destroyed.

The plaintiffs, who have paid the insurance upon Mrs. Frederich's property which was destroyed, bring this action as subrogees of Mrs. Frederich, and allege that the fire in the wood was started from a spark emitted from a passing locomotive belonging to the defendant.

Between the hours of 10 o'clock and noon on the morning of May 18, 1906, the defendant ran the following trains through Auburndale: A passenger train going northwest arrived at 10:59 and departed at 11:00 a. m.; a freight train going eastward passed through Auburndale at 11:32 a. m.

The defendant claims that the fire was not started by a spark from its locomotive, and that it may have been started by a spark from the Connor Company sawmill, by a spark from a fire in the open which was burning during the morning at the mill, by schoolboys smoking among the woodpiles, by a match or cigar thrown onto the wood by some one passing between the piles, by an incendiary, or by some one going from the Connor store to the limehouse.

Judgment was rendered upon the verdict of the jury, which found that the fire was started from an engine of the defendant company; that the defendant was guilty of negligence in allowing the wood to remain on its right of way in the condition and the surroundings; and that such want of ordinary care was the proximate cause of the burning of Mrs. Frederich's property. There is no dispute as to the amount of damages. This is an appeal from the judgment.

For the appellant there was a brief by *John L. Erdall* and *W. A. Hayes,* attorneys, and *A. H. Bright,* of counsel, and oral argument by *Mr. Hayes.*

For the respondents there was a brief by *Husting & Husting,* attorneys, and *Lamoreux & Husting,* of counsel, and oral argument by *Paul Husting* and *B. A. Husting.*

The following opinion was filed October 25, 1910:

SIEBECKER, J. The jury found that the fire which destroyed the wood piled on the defendant's right of way was caused by sparks emitted from one of the defendant's passing engines. This is assailed upon the ground that the evidence wholly fails to sustain such an inference. It is argued that the evidence shows that the engines in question were without defects and were properly managed while passing through Auburndale at the time the fire is claimed to have originated from sparks emitted therefrom. No negligence is charged as regards the proper condition and the proper management of the engine. The ground on which liability of defendant is claimed is that it was negligent in allowing this wood to remain on its right of way under the circumstances and conditions shown.

Assuming that such engines were free from defects and were properly managed at the time, does the evidence sustain the inference that the fire originated from a spark emitted therefrom? There is evidence in the case tending to show that engines in operation as these were do emit sparks. It appears that this is a common result from operating locomotive railroad engines. The claim is made, however, that on the occasion in question the discharge of sparks from these engines was so reduced on account of very light work required of them in passing through this station that this danger was practically removed, and that the black smoke of the passenger engine and the shutting off of steam power on the freight engine accompanying their passage through the station this day sustain this claim. The evidence on this subject presents

a situation from which conflicting inferences may be drawn, and the jury was warranted in finding that sparks were emitted from these engines as they passed through this station.

The further claim is made that the evidence is too vague and speculative to support a reasonable inference that a spark from either of the defendant's engines actually started the fire. The contention is based on the want of direct evidence that sparks were observed; that the fire began burning at a time too remote from the passing of the last train, in view of the highly inflammable condition of the wood where it started; and that other more probable causes were shown to have existed.

We discover no conditions, as shown by the evidence, from which it can be said that another alleged cause was more likely to have caused the fire than an engine spark. The state of the evidence on this subject well justified the jury in rejecting all the other alleged causes as the origin of this fire. The argument that it could not be possible that the fire began to burn so as to be visible at so remote a time even after the first engine passed, under the existing conditions, is not conclusive. It cannot be said that a spark lodged in the material would not lie for some time in a smouldering state before progressing to a state of flames as first observed on the top of the pile of wood. The facts and circumstances shown are such as to make this an appropriate inquiry for the jury to determine in the light of all the evidence bearing on the question. As stated in *Abbot v. Gore,* 74 Wis. 509, 43 N. W. 365:

"The fact that the engine passed shortly before the fire was discovered . . . is some evidence tending to show . . . that the engine did set the fire, notwithstanding it was in good order and properly managed."

True, no witness testified to having seen sparks from either of these engines lodge at the place where the fire was first ob-

served, but this is not necessary to lead the jury to the conclusion that the fire originated from an engine spark. *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721. The court properly refused to change the answer to the first question.

The jury found that the railroad company was guilty of a want of ordinary care in allowing the wood to remain on its right of way. The court instructed the jury that it was the company's duty to provide a piling place for such wood, and that it was not negligence to permit it to be piled where it did when the wood was received, but that they must determine whether, in view of all the facts and circumstances disclosed by the evidence, allowing it to remain on its right of way near the track and passing trains constituted a want of ordinary care.

The appellant asserts that the obligation of the defendant to receive this wood and place it near its road for shipment rightfully included reception of it in the quantities and at the place it did, and that it properly allowed it to remain there under the conditions and circumstances here shown, and that it exercised ordinary care in the conduct of this business up to the day of the fire. It is undisputed that the defendant as a common carrier was obligated to receive and transport firewood, and that it had the right to conduct such business in the manner that ordinarily prudent and careful persons conduct it under the same or similar circumstances. The question whether the defendant conducted this business in such manner must be resolved in the light of the facts and circumstances disclosed. If the evidence tends to show extraordinary dangers and hazards to the property of others from fire incident to the way defendant conducted this business, then, in the exercise of ordinary care, it was required to exercise a degree of care commensurate with such dangers and hazards. The question then is: Does the evidence present a situation from which the jury could infer that the railroad company was guilty of a want of ordinary care in permitting the wood

to remain as piled, in the light of the existing conditions? An examination of the facts shows that the jury was justified in finding that there was a very large quantity of wood collected on this area near the track where trains passed in such close proximity that sparks were likely to fall upon it; that private buildings were so near thereto as to be in danger of being destroyed from a burning of this wood; that the wood had remained there for a long time in a dry and windy season; and that it was in such inflammable condition as to make it highly susceptible to ignite from sparks by reason of the bark being loose, the surface being rough, splintery, and fuzzy, thus rendering it highly inflammable. From a consideration of such conditions in the situation shown, it was reasonable for the jury to find that the defendant's conduct in permitting the wood to remain in such condition on its right of way was not an exercise of due care on its part. *Knickel v. C. & N. W. R. Co.* 123 Wis. 327, 101 N. W. 690.

It is contended that there is a failure of proof that the negligence found was the proximate cause of the destruction of Mrs. Frederich's property. The peril to this property from a burning of the wood was obvious to any person observing the surrounding conditions. We can perceive no reason for saying that this danger was not to be contemplated as a natural and probable result of the negligence found. *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271.

The owner of the property destroyed by the fire did not give the notice of claim of damages to her property by the fire as prescribed by sec. 1816*b*, Stats. (Supp. 1906). The only notices given the railway company within the year from the day the fire occurred, demanding satisfaction for damages to this property on account of such fire, were those of the insurance companies. Sec. 1816*b* prescribes what the notice shall contain and that it is to be "signed by the party owning such property . . . his agent or attorney." It is obvious that the object and purpose of this notice is to notify the rail-

way company that satisfaction will be demanded for alleged damages occasioned by fire set from a locomotive and to apprise it of the time and place of the fire so as to enable the company to make any defense it may have against such claim. This notice is mandatory and a prerequisite to the right to enforce such a claim in the law. *Atkinson v. C. & N. W. R. Co.* 93 Wis. 362, 67 N. W. 703.

A strict construction of the language of the statute would require that all notices be signed by the owner of the property destroyed, his agent or attorney. The object and purpose of the statute is evidently to give railroad companies notice of a claim for damages from locomotive fires, of the person making such claim, and the time and place of fire. We perceive no reason why this purpose is not as fully accomplished when the notice is given by the person holding the claim under an assignment as when given by the original owner of the property. Under such circumstances the statute should receive liberal construction. Considering it in this light, we are led to the conclusion that the rights of the railroad company are fully preserved by a notice conforming to the statute when signed by the assignee or subrogee of the original owner of the property destroyed or by an agent or attorney. The insurance companies stood in this relation to the owner of the property. Their right to maintain action against railroad companies for wrongfully causing a loss, upon payment of the loss to the owner, has been repeatedly affirmed. *Sims v. Mutual F. Ins. Co.* 101 Wis. 586, 77 N. W. 908, and cases cited. This results in giving them the right to take the necessary steps to enforce the claim against the company for its wrongful destruction of the property insured, and a notice signed by their authority fulfils the calls of the statute. There is no dispute as to the giving of such notice within the limits of the time prescribed. It must be held that the statute has been complied with.

The exceptions to rulings as to the admission and rejection

of evidence we do not find to be well taken. Discussion of all of them is not necessary.

The exception to admission of the evidence of the witness Connor pertains to the failure of the railroad company to furnish cars for shipping the wood. The object of this evidence was plainly indicated by the questions propounded; yet appellant's counsel permitted the witness to be examined on the subject without objection and then moved to strike out the testimony. The court properly ruled that the objection came too late, and therefore refused to strike out the evidence. Furthermore, we discover no prejudice resulting from its admission had the objection been timely. Nor do we discover any prejudicial effect in refusing the instructions requested, that there was no evidence on the subject of not furnishing cars when demanded.

Error is assigned that the court erroneously permitted the jury, under its instructions, to find that the fire was set by engines other than the two referred to in the evidence. This is negatived by the direction given them that they were to consider only such engines as the evidence showed passed the piles of wood.

It is urged that the remarks of counsel pertaining to the production of the notices served on appellant; his conduct in propounding improper inquiries to the appellant's claim agent and section foreman; his assertion that engines generally emitted sparks and that defendant should have piled its wood where it thereafter piled it, namely, a mile or two distant, all operated to prejudice the jury to an extent so as to render them incapable of arriving at a just verdict. We are not persuaded that counsel's conduct had such prejudicial effects, and do not think that the conclusion of the trial court should be disturbed.

The denials of the applications for change of venue are abundantly justified by the record. Trial courts are vested with a large discretion in passing upon such applications.

The facts before the court in this case, as presented in an unusually large number of affidavits and by the subsequent examination of the jurors on the subject, clearly show that the trial court properly held that no grounds were shown calling for a change of venue of the case.

Upon defendant's motion for a review of the taxation of costs by the clerk, the court modified the clerk's action by striking out certain items taxed, and refused to modify the bill allowed as to the following items:

$2.88 for notices under sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307). This was proper under the third paragraph of sec. 2921.

$36.90, sheriff's fees for serving summons. Appellant contends the charge should be itemized to authorize its allowance. There is no affirmative showing that the item is excessively incorrect. Under *Jones v. Foster*, 67 Wis. 296, 313, 30 N. W. 697, the court properly allowed this item.

$35.40 for stenographer's fees in taking a deposition before a justice of the peace. Upon objection to this item the bill was amended by changing the charge so as to make it a fee of the justice. The item then equaled the twelve cents per folio allowed the justice. This item as finally charged was the correct amount to which the justice was entitled.

Certain witness fees allowed by the clerk were held improper by the court because such witnesses were allowed fees for attendance both at the taking of their depositions and also at the trial. The court refused to allow fees for their attendance while their depositions were taken, and allowed a *per diem* and fees for travel for attending court during the trial of the cause. This was proper and correct.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

BARNES, J. (*dissenting*). It is undisputed that the wood burned in this instance was a commercial article piled for

shipment, and for that purpose only, on the defendant's right of way. It is not claimed that it was not the duty of the defendant to furnish the piling ground. The trial court so charged the jury. The sole and only ground of negligence found was that the defendant was guilty of a want of ordinary care in allowing the wood to remain on its right of way.

There is some very indefinite and uncertain testimony in the case to the effect that more of the wood would have been shipped previous to the time of the fire had all the cars ordered been furnished. There is no pretense that all or any considerable portion of it would have been moved had the cars demanded been supplied, and there is absolutely no evidence in the case to sustain a claim that the failure to furnish cars was the proximate cause of the damage which plaintiffs seek to recover in this case, and no such finding is made. We have before us a situation where the defendant furnished a shipper piling ground for wood on its right of way which the shipper had not attempted to move at the time of the fire. The wood had been delivered on the right of way during the winter of 1905–6, and up to and during the month of April, 1906, the fire occurring on May 18.

The importance of this case is not measured by the amount involved. Indeed its consequences may and probably will be far reaching. It is sometimes said that precedents are of little value in negligence cases, because it seldom happens that two cases are alike in their facts. The statement is more nearly correct as applied to personal injury actions than to others where recovery is sought on the ground of negligence, and yet there is hardly an assignment of causes disposed of in this court where former decisions are not cited in personal injury cases as being decisive on questions of negligence or contributory negligence.

To my mind the case presents no situation that is either extraordinary or unusual. On the contrary, it presents one that is common and usual in the timber-producing section of

Wisconsin, which comprehends a large part of its area. The weather had been dry for some time before the fire, but dry spells are common any time between April 1st and November 1st. There was nothing about the quantity of the wood to suggest an unusual condition. It hardly covered two thirds of an acre. It was probably no greater than the average amount of forest products that would be found piled for shipment at stations of defendant in a timbered country. There is nothing unusual about the damage which might result in case of fire. A fire started on a right of way miles from any building might well be more destructive to property than one starting where the fire in question did. The material was combustible, but not more so than vast quantities of other material found piled along railway tracks during the spring and summer months. Some of it was kiln wood and was very much decayed and rotten. I apprehend it would be no great task to secure plenty of witnesses who would truthfully testify that in their opinion dry rotten pine and hemlock wood was no more combustible than sound wood of the same kind that was thoroughly dry, and this court would be concluded by the verdict of a jury on that question of fact. If there was any unusual or extraordinary condition in this case a like condition would be found to exist by a jury, or by a court for that matter, if the material piled on the right of way had been dry hemlock bark, dry cedar poles or posts, dry pulpwood, dry mixed fuel wood, birch logs, green or dry, dry pine logs, or green ones for that matter, when pitchy, dry lumber, or even dry hardwood or hemlock logs, as well as other kinds of raw and manufactured material that might be mentioned. A spark lodging in an opportune place for setting a fire, fanned by a wind, would start a conflagration in any of the commodities mentioned.

The tonnage in raw forest products in Wisconsin is very great. The material is very bulky, and much of it must be handled as economically as possible to have any margin of

profit that would warrant handling it at all. As to some kinds of such material at least, the difference between the cost of shipping it dry or green may determine whether it can be handled at all. In the past vast quantities of hardwood have been burned because it could not be delivered at the consuming market at a price that would justify its conservation. Green mixed firewoods could not be moved any considerable distance to market at the present time. A large part of this raw material, such as sawlogs, poles, posts, tanbark, pulpwood, and cordwood, is cut by farmers and small jobbers who haul the same to the railroads during the winter months. Much of it is piled with the purpose and intention of leaving it to dry out so that it can be shipped at a profit. Much of it is not sold when delivered and is not intended for shipment until the owner can make an advantageous sale.

It may be that the methods heretofore in vogue in carrying on business in certain portions of the state have been reckless and negligent and that it is time to call a halt. Certainly a change in that method will entail a great deal of loss, which will bear heavily on the pioneer farmers and small contractors who can ill afford it. We have various statutes requiring carriers to furnish reasonably adequate shipping facilities. Storage room for timber products along a railway is almost an indispensable facility in the shipment of timber products. In this connection reference is made to secs. 1797—3, 1797—9, 1798, 1800, 1801, 1802, 1802*a*, and 1831*a*, Stats. It seems to me that the decision places the railway companies in the position where they must choose between the alternative of receiving and storing forest products and paying all damages that may result from fire that is communicated therefrom during dry weather, whenever in the opinion of a jury the material is as combustible as that piled on the right of way in this case, or else of refusing to permit such material to be piled upon its right of way unless it has positive assurances that the same will be shipped before the advent of dry weather

and when it is in position to furnish cars for such shipment. It was not found that the railway company was negligent because it failed to maintain a fire patrol or a fire department, but because it permitted the wood to remain on its right of way at all. I can see very little difference between this case and one where a manufacturer of lumber allows lumber to remain in his yard long after it is dry because perchance he is unable to sell it. Sparks from the smokestacks of his saw or planing mill, or from the slab or shavings burners operated in connection therewith, or even from passing locomotives, may start and frequently have started disastrous fires in lumber yards. But it has never been generally supposed that because the lumber was dry and combustible, and slab burners, smokestacks, and locomotives threw sparks, a right of action existed in favor of a property owner whose property was burned in the conflagration, without showing that the fire was negligently set or negligently permitted to escape. I do not think that the wood involved in this case constituted a nuisance or that the defendant was guilty of an unlawful act in permitting it to remain on its right of way. I think it used its right of way in the usual and ordinary way in which rights of way are used in a timbered country. The decision of the court opens up a broad field for litigation, by holding an act to be tortious which heretofore was not considered so. In Illinois it is held that it is not contributory negligence for a person to stack straw on a railway right of way in close proximity to railway tracks. It is further held that such fact would not justify the trial court in instructing the jury that the burden of proof was on the owner of the straw to show that the act was not a negligent one. *American S. Co. v. C. & A. R. Co.* 177 Ill. 513, 53 N. E. 97. It is also held that it was not negligent for the owner of a barn filled with hay and adjacent to a railway track to leave a window therein open so that sparks from a passing locomotive set the hay on fire. *Cleveland, C., C. & St. L. R. Co. v. Tate,* 104 Ill. App.

615. In Alabama it is held that depositing cotton on a depot platform and leaving it there three weeks without giving any shipping directions is not negligence as a matter of law. *Southern R. Co. v. Wilson,* 138 Ala. 510, 35 South. 561. A like ruling is made in *Alabama & V. R. Co. v. Fried,* 81 Miss. 314, 33 South. 74, and in *Railroad Co. v. Short,* 110 Tenn. 713, 77 S. W. 936. These cases recognize the well known fact that cotton is extremely inflammable.

Dangerous acts are not necessarily negligent ones. If so, the use of steam threshers would create a liability every time a straw stack was set on fire and the fire was communicated to adjacent property. One who employs the element of fire to generate steam, or under any other circumstances which render it especially dangerous to others, is held to the exercise of ordinary care only. *Read v. Morse,* 34 Wis. 315. And it is held that the true test of the duty of a sawmill owner in regard to preventing the escape of sparks is the use of such appliances as are usually used by men of ordinary care and prudence generally engaged in like business under like circumstances. *Rylander v. Laursen,* 124 Wis. 2, 102 N. W. 341, and cases cited. In that case recovery was sought against a sawmill owner by an adjacent property holder whose logs and standing timber were burned because of sparks emitted from the smokestack of defendant's sawmill. It seems to me that there was no evidence showing want of ordinary care in this case, and that it is a matter of common knowledge among those familiar with conditions and the manner in which business is carried on in the wood-producing section of the state that there was no want of ordinary care.

MARSHALL and VINJE, JJ. We concur in the foregoing opinion of Mr. Justice BARNES.

A motion for a rehearing was denied January 10, 1911.

HOUG, Respondent, vs. GIRARD LUMBER COMPANY, Appellant.

October 25, 1910—January 10, 1911.

Appeal: Review: Questions of fact: Master and servant: Injury from unguarded machinery: Contributory negligence: Sufficiency of evidence.

1. While the verdict of a jury should not be disturbed on appeal as being contrary to the evidence if there is any evidence which, in any reasonable view, will sustain it, and the decision of the trial court denying a motion to set it aside should not be overruled unless clearly wrong, nevertheless, physical situations and impossibilities sometimes controvert the testimony of witnesses given upon the stand and must be given controlling weight.
2. Neither the statute relating to the guarding of machinery so located as to be dangerous to employees in the discharge of their duties, nor the common-law rule on the subject, applies to a situation where, in order to come in contact with such dangerous machinery, the employee must necessarily go out of the usual way and out of any way which he would reasonably be expected to take.
3. An employee in a sawmill was injured by having his foot caught between a sprocket wheel and a chain. One of his duties was to oil certain machinery about eleven feet above the floor. He had performed this duty safely for a considerable time in the usual way, ascending, as he had been instructed, by a stairway to a platform near the machinery. In so doing he did not come near the sprocket wheel. Before the accident, however, he had adopted a new way, ascending by a ladder on the other side of the machinery to a plank laid upon timbers. At the time in question he had stepped from the plank over the moving chain and then back again, in a stooping posture, to a slender foothold on a timber just below the chain, and was attempting, without returning to the plank or to the floor, to reach other machinery by moving along another timber close to the chain and the wheel and covered with frozen sawdust. He knew all the conditions surrounding him. His foot slipped and was drawn in between the chain and the sprocket wheel. *Held*, as a matter of law, that he was guilty of contributory negligence.
4. In such case it was no excuse for the injured employee that in going up the stairway he would have to pass close to a broken sawdust spout from which sawdust and other materials were

being ejected, where such break was easily repaired and he had been accustomed to make similar repairs in the past.

5. The defect complained of being an unguarded set-screw projecting from a collar on the shaft of the sprocket wheel a few inches away from the wheel, and plaintiff's own testimony showing that his foot was drawn in between the chain and the wheel until the wheel stopped because of the obstruction, testimony to the effect that the set-screw continued to revolve and cut into the flesh of his foot was incredible, and a finding by the jury that the injury was caused by such set-screw was unsupported by the evidence.

6. No amount of conjecture or weight of mere possibility can support a verdict in plaintiff's favor in an action for personal injury, but reasonable certainty as to the cause of the injury must be established to warrant a recovery.

KERWIN, SIEBECKER, and TIMLIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Marinette county: SAMUEL D. HASTINGS, Circuit Judge. *Reversed.*

Action to recover for a personal injury. Plaintiff pleaded that, while in the due performance of his duty as an employee of defendant, he was severely injured in his right foot by reason of its being caught by a revolving shaft, armed with a sprocket wheel, collar, and projecting set-screw, so located as to be dangerous to employees in discharge of their duties, unless securely guarded, and that no guard whatever was provided.

All material allegations respecting the circumstances of the injury were put in issue by answer.

On the evidence the main controversy was as to whether the injury occurred by reason of plaintiff's foot having come in contact with the unguarded set-screw or it being carried by the sprocket chain against the sprocket wheel and caught between them; whether such set-screw was so located as to be dangerous, unless securely guarded or fenced, to employees in the discharge of their duties; and whether plaintiff was guilty of fatal contributory negligence.

The evidence was to this effect: Plaintiff was forty-two years of age. He had worked in and around the sawmill

where he was injured for years and was familiar with all parts of it, particularly the part where the accident occurred. He had been oiler for some months before he received the injury and had been many times in the place where he made the fatal movement. The particular work preceding such accident was oiling journals at the tightener frame. In doing this he had to ascend from the basement floor of the mill about eleven feet. The usual way was from the south side of the frames by a pair of stairs. Then there was a platform to step out upon, which reached nearly to the frame. In going that way one did not approach the region of the sprocket wheel. There were no interferences except what was caused, from time to time, by escape of sawdust and pieces of wood from a break in the east sawdust spout. Such a break happened from time to time, but was easily repaired by nailing on two or three small pieces of boards. It was but the operation of a few moments to do that. It was not particularly plaintiff's business to repair such breaks, but he was allowed to do it, as he saw fit, and on occasions did do it. Whenever repairs were needed the fact came specially to his attention, and he was particularly interested in the matter, unless he chose to approach the tighteners from the north side. Some pieces of boards were off the side of the sawdust spout at this time. He gave as a reason for not replacing them, that he did not think of it, and said, in effect, that he chose to do his work by going up on the north side of the frames, though had it not been for the interferences coming from the hole in the sawdust spout he would have gone up on the other side. For a long time before he commenced doing the oiling, the only way in use of approach to the frames was from the south side. He was instructed in that regard. He used that way for a considerable length of time and then discovered and adopted the way he was using immediately before the injury.

The situation was this: There were two tightener frames in the basement story of the mill hung from the floor above and

reaching down several feet. They were in a line east and west and about five feet apart. A little north thereof, parallel therewith, and a little below them there was an eight-inch square timber. Projecting directly down from the main floor, just north of the timber and a little west of a line drawn at right angles with the west side of the east tightener frame, there was a sawdust spout. East of the west tightener frame there was a similar spout. About midway between the two spouts on the eight-inch square timber the journal box of the sprocket wheel was located. It was eight inches long with and reached nearly across the timber, was about five inches high, and had an oil cup in the top. Plaintiff was accustomed to oil at that point about once a week. The sprocket wheel was slow moving, the revolutions being about twenty-four per minute. The journal did not need oiling on the occasion in question. Plaintiff did not approach it for that purpose. The shaft was two inches in diameter, was short, and ran north and south. It projected through the box to the north, somewhat. On the inner side of the box there was a two-inch-wide collar kept in place close to the inner end of the box by a set-screw projecting outward to within about two inches of the rim of the wheel. There was a little space between the inner edge of the timber and the south end of the box, which was cut out, thus making room for the collar to operate. It was inclosed, largely, in the south side of the timber. The sprocket wheel was fastened to the shaft about one and one-half inches from the collar, so the wheel was about three and one-half inches from the box, but only about two or two and one-half inches from the timber. It was seven or eight inches in diameter and one and one-half inches wide at the rim. It carried a sprocket chain made of links about three inches long and two inches wide. The projections on the wheel were about one and one-half inches long. They extended beyond the outer side of the links, as the latter engaged the wheel, and were rounded on the ends. The sprocket chain

ran at an angle somewhat upward from the plane of the timber and to the east, so that at a point opposite the east tightener frame, the lower chain was a little above the lower cross-timber thereof, and the upper chain, by reason of weight and slack, was practically on the lower one. The power was exerted on the latter which moved to the right, passing under the sprocket wheel a little below the level of the top of the timber. A ladder was provided for ascending to the place for oiling the journal, which was some eleven feet from the basement floor. Plaintiff in order to construct for himself a way of reaching the tightener frames and journal box, placed, securely, a plank of sufficient width to enable him to walk on it, in a somewhat stooping position, on account of the floor above, about fourteen inches north of the timber and on a level therewith. This plank spanned the space north of both tightener frames and the journal box, and was near enough thereto so that plaintiff, when standing upon it in front of either, could reach and grasp the side of the frame with his left hand, and, holding his oil can in the right, step, and partially raise himself to a standing position, on the lower cross-piece of the frame, in which position he would do the oiling. In the particular instance he placed his ladder against the timber at the east end of the plank. He then ascended to and stepped onto the plank and walked west to a point north of the east tightener frame. The sprocket chain was in operation. He passed his left foot over the chain to the lower cross-piece of the frame, taking a pretty long step in doing so, southward and upward. Grasping the east side of the tightener frame with the left hand he raised up so as to stand on the cross-piece, resting his whole weight on the left foot. He then put his left arm around the east side of the tightener frame, and there stood with his right foot backward and outward—the limb being outside of and near the moving sprocket chain—and did the oiling. That over, he endeavored to retreat by first placing his right foot on the timber just outside of and a little

lower down than the chain. That not being feasible, as he thought, because of a frozen accumulation of sawdust on the timber, he passed his foot under the sprocket chain sufficiently to locate the toe thereof securely on the cross-timber of the tightener frame. Then he lifted the left foot over the chain and gave it a location similar to that of the right foot. Thus he secured himself in place with the toes of his shoes resting on the tightener frame and the sprocket chain in motion a few inches above his feet and just in front of his lower limbs, maintaining his equilibrium by leaning slightly forward and keeping a secure hold on the tightener frame. The next duty he had in mind to do was to oil the journals at the west tightener frame, located, as indicated, on the other side of the sprocket wheel. He could as readily have stepped back to the plank as he stepped from it, and proceeded to and down the ladder and then moved that west to the vicinity of the other tightener and thereby reached it without going near the sprocket wheel. That was the way he had ordinarily performed the work since he had chosen to approach the tighteners from the north, instead of the south side. As he stood in the position aforesaid, there was a floor timber at his back which came down sufficiently to render it necessary for one, in reaching a tightener frame from the plank or the plank from a tightener frame, to bend down somewhat. He knew all the conditions surrounding him, particularly the fact that frozen sawdust was irregularly located on top of the timber near the sprocket wheel journal. He concluded not to return to the floor and reach the west tightener frame by means of the ladder, but to go along the plank, passing by the end of the sprocket wheel shaft, or along the timber and over the sprocket wheel box. Instead of stepping to the plank as he had stepped from it, he supported himself on the right by placing his hand or arm on the side of the sawdust spout, then—with his left hand grasping or left arm placed around the west side of the tightener frame, and so maintaining a substantially upright

position—he reached his right foot quite a good step outward and around the sawdust spout, for the purpose of locating it on the timber between the spout and the bearing of the sprocket wheel shaft. In doing so his foot encountered the uneven surface at the top of the timber, slipped inward, on top of the lower sprocket chain, and was quickly carried west to and caught between the chain and wheel and severely injured. When his foot, or some part of its covering at least, was carried between the wheel and chain, it stopped the machinery. Motion was transmitted to the sprocket wheel shaft by a friction, allowing the interference of plaintiff's foot, as aforesaid, to overcome the contact and bring the sprocket wheel to a stop. It was so located that no employee in the discharge of his duties was liable to get in dangerous proximity thereto, as the work had been done prior to plaintiff's choice of the particular way described.

There was some conflict in the evidence from the mouths of witnesses as to whether plaintiff's foot came into contact with the set-screw. Here is the evidence of plaintiff, substantially: The shaft was turning at a slow rate, about thirty revolutions per minute. The under chain was in motion toward the sprocket wheel. In trying to place my foot on the timber it slipped in on top of the chain and was caught between it and the sprocket wheel. The foot was dragged in between the chain and the wheel till the wheel stopped against the inside of my foot, and then the set-screw commenced to work, gouging piece by piece. The set-screw dug into my foot on the top and side down to the toes as it went around and around. The chain drew my foot right into the sprocket wheel. That stopped the wheel from running. Otherwise it would have wound my leg around the wheel. Everything stopped and that was the position I was found in. They had to take the top off the box and pry up the shaft to get me out. I then got out by crowding my foot down between the timber and the sprocket wheel.

That was the way plaintiff left the case at first. Then he testified about like this: My foot was in on top of the bottom chain and was drawn under and against the set-screw. The big toe and toe of my rubber went under the sprocket wheel. The wheel revolved some time after my foot was caught. My foot was caught on the right side in the sprocket wheel. My foot slipped right ahead. The wheel caught my leg and dragged my foot in. My big toe was not hurt. My foot stopped the sprocket wheel when it got in tight enough. The wheel went clear around after my foot was caught. It did not have power to drag my foot clear around and break my leg, so when my foot was dragged in the wheel stopped. The wheel did not go around after the shaft stopped. It was going around when it dragged my foot in close. It went around several times. It did not have power enough to carry my leg under so the wheel stopped.

Again the matter was taken up and plaintiff gave about this: I do not think my big toe came under the sprocket wheel. There was room for the toe of my rubber to be caught without catching my toe. I was too scared and excited to know just how it was, but my foot was held there in some way.

Axel Peterson, who helped release the plaintiff, testified that the latter's foot was not caught in the sprocket wheel at all; that his foot was fast under the collar, and that the set-screw pointed up; that the top of the box was not taken off in order to release him; but that they sprung the shaft a little with a handspike, "sprung her—gave it a little slack" and then worked plaintiff's foot out without turning the wheel back.

The doctor, who testified in plaintiff's behalf, described the injury as a lacerated wound on top and across the instep. He said there was no injury to the toes or the foot other than the wound across the top where the tissue had been torn away with probably some injury to the bones; that adhesions had formed binding the three bones connecting the three middle toe joints with their instep bones together and causing con-

tractions of the tendons of such toes so as to draw them upward.

The cause was submitted to the jury, resulting in a verdict substantially as follows: There was an unguarded set-screw in the collar on the sprocket wheel shaft. It was so located as to be dangerous to employees of the defendant in the discharge of their duties. Plaintiff's foot was injured by the set-screw. No want of ordinary care on his part contributed to the injury. It will take $4,651 to compensate him for his injury.

Judgment was rendered for plaintiff on the verdict.

For the appellant there was a brief by *Eastman & Martineau,* and oral argument by *E. C. Eastman.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

MARSHALL, J. The judgment must be reversed for three reasons. Each involves the sufficiency of the evidence to support some vital part of the verdict. In condemning the result as to each such feature, we keep in mind that this court should not disturb the verdict of a jury as contrary to the evidence, if there is any evidence, which, in any reasonable view, will sustain it; and also appreciating the force which should be given to this other rule: in case a trial court on motion to set aside a verdict as contrary to the evidence approves it, his judgment should not be overruled unless clearly wrong. But in reaching our conclusion we have also to appreciate that the manner of an occurrence as testified to from the mouths of witnesses is not necessarily to be taken as matter of fact even if not in like manner contradicted. Sometimes physical situations and impossibilities speak much more weightily than the vocal utterances of any witness, or number of witnesses. The former cannot falsify. The latter can and often do. The one is indisputable. The other never is.

The jury found that the shaft with the unguarded set-screw was so located as to be dangerous to employees of the defend-

ant in the discharge of their duties. Why so? It was entirely out of reach of any of the employees in the discharge of their duties. It will be seen by the statement that the way of reaching it was by ascending eleven feet from the basement floor. There was no occasion for going near it except to oil the bearing of the sprocket wheel shaft. In that, there was no occasion for any part of an employee's person or clothing coming in contact with the shaft where it was armed with the set-screw. Really, it was not possible to do so without actually invading the region some six inches beyond the oil cup on the journal box, which ~~no one, it seems, could~~ reasonably be expected to do. An operator had, actually, to go outside any course which any one would reasonably be expected to take, as respondent in fact did, in order to reach the uncovered set-screw. The evidence leaves no doubt but what no one would have supposed an employee would attempt what respondent did,—climb around on the narrow timber supporting the end of the sprocket wheel shaft, cling by one hand-hold and one foot-hold to the tightener frame, with his person hanging, as it were, out over the sprocket chain; then climb down over the chain, placing the feet on the cross-piece of the tightener frame, the rapidly moving chain coming just over the top of the feet, making it necessary to keep hold of some support with both hands to avoid danger of severe injury; then work along by the aid of hand-holds, in an endeavor to pass around the sawdust spout and get a footing on the uneven surface of the timber in the vicinity of the uncovered set-screw, or gain such footing as a prelude to stepping back to the plank with the idea of groping along it by the end of the sprocket wheel shaft to the other tightener frame. If there be anything in the evidence suggesting, reasonably, that appellant was chargeable with knowledge of any likelihood that an employee would do so, or get into dangerous proximity to the set-screw, we are unable to find it. He got there, as said before, by going out of the ordinary way, choosing to do his work in a different

way from the customary one; a way which he discovered and arranged to suit himself.

The case is ruled, as counsel for appellant contend, by the doctrine that the statute and the common-law rule as well, respecting the guarding of machinery so located as to be dangerous to employees in the discharge of their duties, do not apply to a situation where the employee must, necessarily, go out of any way which he would be reasonably expected to take in order to reach it. *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Miller v. Kimberly & Clark Co.* 137 Wis. 138, 118 N. W. 536.

The foregoing, while condemning the finding of negligence in not guarding the set-screw region of the shaft, logically also condemns the finding that plaintiff was not guilty of any want of ordinary care contributing to his injury. It seems that his conduct invited the disaster which happened to him. He subjected himself to many serious dangers, from the time he made the first step from the plank to the tightener frame till he put his foot, or caused it to go, between the jaws formed by the sprocket wheel and chain. His conduct was specially negligent in that he departed from his previously used but dangerous way of reaching the west tightener frame by trying to contend with the sprocket wheel shaft and its connections, the timber loaded with frozen sawdust, the interfering sawdust spouts, and the narrow plank suspended high above the basement floor,—in attempting to go by a short cut from the east to the west tightener frame. Can one without feeling a sense of shock at the very temerity of it, contemplate the picture found in the statement of facts of respondent for a moment before and at the instant of the accident? See him partly hanging to the east tightener frame by one hand and to the sawdust spout with the other, his left foot just under, and leg close up to, the moving sprocket chain, just the toe of one foot reaching under the chain far enough to obtain a rest on the cross-piece of the tightener frame, his right foot out and

around the sawdust spout; out to the top of the timber beyond the spout, his line of vision naturally directed away from that foot, and his dependency being upon sense of touch to obtain a safe lodgment for the foot on the sawdust covered timber. See him as, half clinging by his hands and arms, he feels for a footing at his right till his foot slips in on the sprocket chain close to the sprocket wheel and is instantly caught between the two. Does not the whole proceeding appear to have been almost foolhardy, when we consider that the ordinary way of approaching the tightener frames was from the opposite side, thus avoiding all the dangers which caused the injury, and that respondent chose to depart from his own customary and dangerous way to one very much more hazardous? Was he not negligent to the point of rashness, in view of the fact that he had been instructed to approach the tighteners from the south side and would have done so had it not been for the interference from the sawdust spout, which he could easily have remedied himself.

Quite as difficult, as in the respects we have treated, we find it to justify the finding that the set-screw did the injury to respondent's foot. At the best the evidence does not more than warrant the merest conjecture that the set-screw reached the foot which was injured. No amount of conjecture or weight of mere possibility can support a verdict in a plaintiff's favor. It must not be forgotten that reasonable certainty, at least, must be established in plaintiff's favor in a case of this sort, as well as in any other, to warrant a recovery.

First we have the fact that respondent's foot blocked the sprocket wheel so it stopped. Therefore the testimony that the set-screw continued to revolve after the foot engaged the wheel must be false. Motion of the wheel necessarily ceased, and that of the set-screw too, as soon as the man's foot was caught between the wheel and the chain, otherwise his leg would have been wound around it and crushed, as he admitted in his testimony. So the injury to the foot must have been done by the time the wheel ceased to revolve. The idea of the

set-screw going around thereafter is too preposterous to be worthy of a moment's consideration. Again, respondent said the set-screw gouged his foot down from the instep to his toes. Opposed to that is not only the fact that the wheel and the set-screw must have ceased to revolve as soon as the foot was caught, since otherwise the leg would have been crushed, but the location of the wound was not from the instep downward to the toes, but across the instep, just where it would naturally be if the foot were caught between the sprocket wheel and the chain and rolled partly under it and thereby crushed and wounded. Again, with the foot between the sprocket wheel and the chain, as the evidence strongly tends to, if it does not conclusively, show, and we are not prepared to say it does not, and as respondent insisted it was to some extent at least,—it was not possible for the screw to reach the foot. There was no room for the foot to get under the collar because it was revolving in a cut-out place in the timber. It was also physically impossible for the foot to have been under the shaft, between the timber and the sprocket wheel. The foot, as it slipped in between the sprocket wheel and chain, must have gone in substantially at right angles, as respondent several times substantially testified. In no other way could it have gotten into the machinery and stopped it. Any other theory would be worse than speculation as to mere possibility. In no other way could the wound have been made across the instep, since the set-screw did not go in reach of the foot. Moreover, when he was found by those who released him, the set-screw was pointing upward. That must have been its position when the sprocket wheel was blocked by the foot because all motion, as stated, must have ceased at that instant. In the position respondent's body was, his foot could not have been turned lengthways of the south edge of the timber and just over such edge so as to have been drawn under the collar or shaft, if there was a place there, which would have permitted it to have been drawn in.

The testimony of the witness called to corroborate plaintiff

was self-destructive so far as it was to the effect that the foot was caught under the shaft. He contradicted respondent as to taking the top off the journal box and lifting up the end of the shaft, and the incredible story of respondent as to his having reached and pushed his foot down and out. The witness and others, as he said, we must remember, put a lever under the shaft and "sprung her up a little," "gave it a little slack," then worked the foot out while respondent "hung to the frame or something." When we think of the short two-inch shaft running in a box, which we must assume was in fair condition, we can comprehend, at once, that the idea that they "sprung her a little," was a mere picture of the witness's imagination, or something worse. He testified to a physical impossibility. His words, "gave it a little slack," are the key to what was done. The only thing they could have given a "little slack" to was the sprocket chain. A "little slack" does not describe any movement that would have been required to get respondent's foot out from under the shaft, if it were possible for it to be there. Give it "a little slack" fittingly characterizes loosening of the sprocket chain. Rolling the wheel back slightly was the only practicable way to release the foot if caught between the wheel and the chain. "Pried her up," under the circumstances, in connection with the fact that the shaft was tight in the journal box, with "give it a little slack," tells the only true story it seems, *i. e.* they put the end of the lever under one of the projections of the sprocket wheel and against the timber or something for a fulcrum, or against the shaft on the south side of the wheel, and from there against the end of a link in the interval between two links at the side, or in some other way obtained a leverage by means of which they turned back the wheel sufficiently to "give it," the chain, "a little slack," and then, as the witness said, "they worked his foot out by hand." We note that the evidence does not indicate what kind of a lever was used. It might have been a bar of iron permitting of giving the chain a little slack in the

way suggested. We do not overlook the fact that the witness spoke of the lever as a "handspike," but that does not indicate but what it might have been of iron or in such form as to permit of the use indicated. Respondent must have been hanging onto something while he was being released, as the witness said, in order to support himself. That something must have been the sawdust spout. Doubtless, as he testified at one point, he was so excited he could not remember just how the accident occurred or how he was released. It was simply impossible for him to have leaned down, as he said he did, and with both hands taken hold of his foot and crowded it down between the sprocket wheel and the timber. He could not have kept his place on the timber while making such a movement. Moreover there was no place, as we have seen, for his foot to be so crowded down and out. The gouged-out space was occupied by the collar, allowing the rim of the wheel to come within about two inches of the timber. Is not that plain when the whole situation is comprehended.

Again, crowding the foot down and out was impossible since it was caught at some point between the wheel and chain requiring the latter to be given "a little slack."

On the whole, it seems clear that the injury was not caused by the projecting set-screw. Too bad, we fully appreciate, the unfortunate plaintiff must irreparably bear his loss. The law does not deal in charity, merely taking from one who will not suffer much by the deprivation, and giving to another who will otherwise seriously suffer. It does not judicially punish one for the benefit of another whom he has not wronged, however much that other may need the assistance. It takes from one who commits a wrong to another's loss, giving the net of that which is taken to that other, not considering any loss for which the one is not responsible, nor any loss for which such other is himself responsible.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment for defendant.

MARSHALL, J. (*speaking independently*). As the writer rests from speaking the foregoing for the court, may he not, appropriately and beneficially, soliloquize briefly upon the law's uncharitableness with distressing losses like that here treated.

Why not such inevitable incidents of activities upon which all depend to satisfy demands of legitimate human desire, be laid at once upon the subjects of consumption where they must in the end inevitably go for final liquidation? Why not with a minimum of anguish instead of with the maximum thereof? Is it not for the whole, indirectly toiled for but removed in general from the zone of danger as well as those who present their bodies to the peril, that the latter be so? If so, why should an element as to either, involving no moral turpitude, be the deciding factor as to whether the one or the other shall be irreparably impaired? And moreover, why irreparably impaired at all, crushing human ambition, human hope, and human life as well? Why should not the sacrifices for all be taken at once as the burdens of all; not scattering by the way human wrecks to float as derelicts for a time, increasing the first cost till the accumulation disappears from view in the world of consumable things? Such losses, starting immediate victims,—particularly the weakest and humblest and often the most indispensable of them to a lower level,—go on by trackless ways till, enhanced by transition over the long road, the whole, disseminated so broadly as to be at last unappreciable, comes to rest as noiselessly, imperceptibly, and certainly as moves the "breath of the summer night,"—upon and is absorbed in, increasing the costs of subjects of human desire, there to be accounted for at the full money equivalent by the exchanges incident to consumption. Is not this a verity? Why then cannot such inevitable end occur without the added loss and arbitrary classification by which the majority of those who feel the misfortune most deeply, are not compensated at

all, and the rest only by transfer in each instance to one engaged with the bodily sufferer in mutuality of general purpose and mutuality of risk from inadvertences which can only be minimized according to the degree of natural infirmities of the mutual actor? The courts cannot answer. They do not make the law. They only execute it, and must do that with fidelity and with care without sympathy or fear or favor. Only the lawmaking power can answer. At its door lies the duty to do so, and will lie any sin there may be in not laboring to that end. To there in increasing volume points and will continue to point unrequited sorrow till there shall be a remedy. If these words shall help to render humanity's petition effective they will not have been spoken in vain.

KERWIN, J. (*dissenting*). Three reasons are given in the majority opinion why the judgment below must be reversed, each involving the sufficiency of the evidence. These reasons are: (1) that the set-screw was not so located as to be dangerout to employees in the discharge of their duties; (2) that the plaintiff was provided with a safe place in which to do his work and chose an unsafe one, in consequence of which he received his injuries; (3) that the set-screw in question did not cause the injury. In attacking the findings of the jury as not supported by the evidence on these points the majority opinion recognizes the well settled rule that if there is any credible evidence to support a finding of the jury it cannot be disturbed, and also recognizes the equally well settled rule that where the trial court, on motion to set aside the verdict as contrary to the evidence, approves it, the judgment of the court below should not be reversed unless clearly wrong. In view of these established rules and also recognizing the further rule referred to in the majority opinion, that "physical situations and impossibilities speak much more weightily than the vocal utterance of any witness," I am of the opinion that

the verdict is well supported by the evidence, therefore the judgment should be affirmed. I shall consider the three propositions referred to in their order.

1. The finding that the set-screw was so located as to be dangerous to employees in the discharge of their duties in my opinion is amply supported by the evidence. It is said in the majority opinion that the set-screw was entirely out of reach of the employees in the discharge of their duties, since it was eleven feet above the basement floor, and that there was no occasion to go near it except to oil the bearings of the sprocket wheel shaft. But it was necessary in oiling the sprocket wheel to go within a few inches of the set-screw. Whatever way the plaintiff took to go to the place of oiling was not material upon the question of whether the set-screw was so located as to be dangerous to employees in the discharge of their duties, if it was necessary in the discharge of their duties for employees to be at such place, and such place was in fact dangerous because of the unguarded set-screw. When plaintiff oiled the journal, which it was his duty to do, he was within a few inches of the set-screw. He had to go to it either by going up on the inside and walking on the timbers to it, or by going up on the outside and reaching it from the plank on that side. Neither on the inside nor the outside could the point be reached so as to do the oiling without coming in close proximity with the set-screw. If, as I shall hereafter undertake to show, the use of the plank in doing the oiling was authorized by the defendant and reasonably safe for the purpose of reaching the place of oiling, and the set-screw was so located as to be dangerous when plaintiff was so in close proximity to it, then it was the duty of the defendant to guard it. As a matter of fact, the set-screw being south of the oil cup, plaintiff would be nearer to it when oiling from the south side than when oiling from the north side, where he was at the time of the injury. Moreover, it appears from the evidence that it was rather dark at the place in ques-

tion. So it seems clear under the authorities that the evidence was ample to warrant the jury in finding that the set-screw was so located as to be dangerous to employees in the discharge of their duties. *Miller v. Kimberly & Clark Co.* 137 Wis. 138, 118 N. W. 536; *Chopin v. Combined Locks P. Co.* 134 Wis. 35, 114 N. W. 95; *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694; *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662.

In *Kreider v. Wis. River P. & P. Co., supra,* the court, after referring to several cases in this court, said: "Most of the cases leave it to the jury to say whether the unguarded shaft or gearing was so located as to be dangerous."

In *Walker v. Simmons Mfg. Co., supra,* the set-screw in question was in a shaft some nine feet above the floor, in a place where it was contended it could interfere with no one and where no person had any right to go in the discharge of his duties, and that the injured party was outside of his allotted territory when injured; but the court held that the question of whether the set-screw was so located as to be dangerous was a jury question.

In *Chopin v. Combined Locks P. Co., supra,* the same contention was made as in the preceding case, and it further appeared from the evidence that at the time of the injury there was another way in which the injured party could have reached the place of performance of his duties without passing by the set-screw, and that the only duty which would require an employee to be near the set-screw was in oiling, and it was held that whether or not the set-screw was so located as to be dangerous to employees in the discharge of their duties was a jury question.

In *Miller v. Kimberly & Clark Co., supra,* there was evidence that the defective shafting was suspended so high above the working floor as to be beyond the reach of servants in the discharge of their duties, but that the servant in the performance of some of his duties occasionally, as the master knew,

would walk upon timbers in the vicinity of the unguarded shafting. It was held that the master ought reasonably to have apprehended that the condition of the shafting endangered the servants. In this case also the injured person had to go out of his ordinary course in order to come in contact with the set-screw.

2. Regarding the contributory negligence of the plaintiff the majority opinion holds that plaintiff was guilty of negligence which contributed to his injury in not approaching the tightener from the south side or going up in what was called the inside way. While it is true that plaintiff did ascend on the south side and do the oiling for several months by going up that way, there is ample evidence to support the findings that after some remodeling and improvements in the mill plaintiff placed the plank in question, upon which, in connection with a ladder, he approached the tightener, and that this mode of doing the work was permitted by defendant and was a more convenient and safer way than the manner in which he formerly had done it, and that he continued to do his work by going up on the north side for a month before the injury. It also appears from the testimony that before plaintiff put up the plank on the north side he informed the millwright that he intended to do so and told him that it would be handier to do the oiling in that way, and that the millwright said, "I don't care," or "Do as you please." So I think there is ample evidence that this appliance to enable oiling from the outside was put up with the knowledge and consent of the defendant's millwright. I think the evidence is ample also to warrant the jury in finding that the outside way of oiling, by going up upon the plank, was at least as safe, if not safer, than the inside way. Plaintiff so testified and also testified to various chains, saws, flying splinters, timber, and divers other things which had to be encountered when doing the oiling by going up on the inside. Besides, a platform extended only part of the distance and he had to walk upon timbers in going to the

place of oiling. He testified, in reply to a question as to whether the outside way of doing the oiling was the more dangerous, "No, sir; it was more danger from the inside than from the outside where I was caught."

Plaintiff gave considerable evidence in detail respecting the dangers which he encountered in going up the inside way. He testified in effect that a saw was from twelve to fourteen inches from him in oiling the tightener and that there were all kinds of chains and shafting there; that in order to get to the place where he worked at the tightener he went half way on the platform and the rest of the way on the timbers, which were usually covered with sawdust. Sometimes in going up to oil the tightener he would be so close to the chains that they would rub against his side; that he had nothing to stand upon when he went up behind except the timbers; nothing to take hold of, only put his hand on the frame of the tightener, and that the saw which worked on the slash table threw pieces of wood and slivers with much force.

Stress is also placed on the fact that the evidence conclusively shows that plaintiff was guilty of contributory negligence in getting down from the tightener frame in the manner he did. It appears from the evidence that he was obliged to get from the plank onto the tightener frame as he did in order to do the oiling; that for a month before the injury he had been getting down from the tightener frame after oiling by first stepping from the lower timber of the frame onto the timber below and then onto the plank, which was from fourteen to sixteen inches north of and parallel with the timber, but that on the day in question he could not get a foothold on the timber because of the accumulation of frozen sawdust, and that he then moved westward on the timber, putting his left arm around the tightener frame and holding onto the sawdust spout with his right hand. It was about twelve inches from this spout to the sprocket wheel. He moved in this way, as the evidence tends to show, for the purpose of

reaching a point where he could get a foothold on the timber and get onto the plank and thus proceed upon it to the west tightener. Had it not been for the frozen sawdust on the timber parallel with the plank and about eight inches below the lower timber of the tightener frame on which he stood, he would have gone on the plank in the usual way. Plaintiff testified that he did not intend to work his way out on the timber to the other tightener; that he had to get out on the plank to get to the next tightener and did not intend to go along the timber to the other tightener.

It is obvious from plaintiff's evidence that it was dangerous at least for him to attempt to get onto the plank from the tightener frame. He says he could not; that since he could not get a foothold below, together with interference by a timber above near his shoulders, he could not turn around so as to get onto the plank without first getting a foothold on the timber which was parallel with the plank; that he could not turn around in the position he was in when he tried to get off the frame; that there was no other way to do the oiling except from the inside, which was more dangerous. It seems to me clear, therefore, that in the situation in which plaintiff was placed, upon the evidence, it was for the jury to say whether the plaintiff was not in the exercise of ordinary care and guilty of no negligence in moving his foot west of the sawdust spout in order to get a firm footing and thus get upon the plank from a point west of the spout. He testified that the method of getting down was to get onto the timber, then turn around and step out upon the plank, then proceed along the plank to the other tightener, which was located about five feet west of the east tightener. A very vivid picture of plaintiff on the tightener frame and his recklessness in assuming such a position is painted by the writer of the majority opinion. But there is abundance of evidence to the effect that the inside way was more dangerous than the outside way which was pursued by plaintiff for a month before the injury and, as plaintiff

says, with the knowledge and consent of defendant. Under sec. 1636*jj*, Stats. (Supp. 1906: Laws of 1905, ch. 303), assumption of risk is out of the case (*Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839); and whether the plaintiff was otherwise guilty of negligence contributing to the injury was for the jury. *Miller v. Kimberly & Clark Co.* 137 Wis. 138, 118 N. W. 536; *Chopin v. Combined Locks P. Co.* 134 Wis. 35, 114 N. W. 95; *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694; *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770; *Novak v. Nordberg Mfg. Co.* 141 Wis. 298, 124 N. W. 282; *Clary v. C., M. & St. P. R. Co.* 141 Wis. 411, 123 N. W. 649; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803; *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 119 N. W. 833.

In *Richmond & D. R. Co. v. Powers,* 149 U. S. 43, at page 45 the court said:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

3. It is also held in the majority opinion that the evidence is not sufficient to support the finding of the jury to the effect that the set-screw did the injury to plaintiff's foot. On this point as on the others heretofore treated I think there is an abundance of evidence, and that while it is evidence, in the main, from the mouths of witnesses, it is not against physical facts, nor is it incredible. It is said in the majority opinion, "at best the evidence does not more than warrant the merest conjecture that the set-screw reached the foot which was injured." This is a very strong statement in face of the fact that there is positive testimony of a witness other than plaint-

iff, apparently credible, to the effect that the foot was caught fast under the collar in which the set-screw was located and that he helped to release the foot.

It is true there is some conflict in plaintiff's evidence regarding how he got his foot caught. He first speaks of it being caught in the sprocket wheel, but afterwards explains that only the toe of his rubber was caught in the sprocket wheel and that his instep was caught under the collar and as the shaft turned the set-screw gouged out his instep. Of course if the foot was caught in the sprocket wheel and immediately stopped it and was not in contact with the set-screw, there could be no gouging out of the foot as testified. But it will be remembered that the sprocket wheel and collar in which the set-screw was situate were only about two or three inches apart, and the toe of the rubber might easily be in the sprocket wheel and the set-screw and collar in contact with the instep at the same time, and the toe of the rubber and heavy footwear worn at the time, together with the instep crowded under the collar, might have stopped the sprocket wheel and shaft, as it appears from the evidence the sprocket wheel did stop after the set-screw had revolved several times and gouged out plaintiff's foot. It is also said in the majority opinion that it was impossible for the screw to reach the foot because the collar was revolving in a cut-out place in the timber, and that it was physically impossible for the foot to have been under the shaft between the timber and the sprocket wheel, because it must have gone in at right angles, and that in no other way could it have gotten into the machinery and stopped it. There is evidence that the sprocket wheel was eight and one-half inches in diameter from point to point of the sprocket prongs and that the prongs were one and one-half inches long and the shaft was two inches in diameter. This would give about three inches projection beyond the surface of the shaft to the point of the sprocket prongs, and the collar was one and one-half inches from the shaft out, and the set-screw extended

beyond the collar about three-fourths of an inch, or out nearly as far from the shaft as the sprocket wheel. So from this it will be seen that even if the contact of the foot was at right angles when the toe of the rubber was in the sprocket wheel and probably between the prongs, the instep would be in contact with the set-screw. Besides, it is by no means clear that the foot reached the shaft at right angles. It also appears that a timber under the shaft was gouged or dished out so as to make room for the collar to revolve, but the extent of this dishing out does not appear definitely from the evidence. However, the plaintiff testified that his foot was between the shaft and the timber, and every time the set-screw came around it dug into his instep and dug out about two or three inches wide of the instep. The witness Peterson testified that plaintiff's right foot was fast under the collar and was not fastened in the sprocket wheel at all and that a set-screw projected from the collar five-eighths of an inch at least. The foot was in so it could not be pulled out; they did not take the shaft out of the box, but "pried her up with a handspike, sprung her." True, there is some conflict as to whether the top was taken off the box to get the shaft up. Peterson says it was not taken off, and plaintiff testified that his foot was gotten out "by taking the top casting off and prying the shaft up, on account of that shaft was under another bigger shaft further out." Whether the top of the box was taken off or whether the foot was taken out by prying and springing the shaft was a jury question. The plaintiff in his complaint and by his evidence seems to rest his case on negligence of defendant to guard the set-screw. It would seem that if the defendant was negligent in maintaining the unguarded set-screw it was likewise negligent in maintaining the unguarded sprocket wheel and chain. Sec. 1636*j*, Stats. (1898), is quite broad and requires the owner or manager to securely guard or fence all belting, shafting, gearing, hoists, fly-wheels, elevators and drums therein which are so located as to be dangerous. This

language would seem to be broad enough to cover a sprocket wheel operating on a shaft with a sprocket chain upon it when so located as to be dangerous to employees in the discharge of their duties. But even if we confine the negligence strictly within the terms of the complaint, namely, an unguarded set-screw, we think the evidence sufficient.

After a careful reading of all the evidence and with due regard for the majority opinion I cannot bring myself to the conclusion that the findings of the jury are not supported by the evidence. In this conclusion I am supported by the learned and able judge who tried the case and two members of this court, as well as the rule of this court to the effect that findings of the jury can be disturbed only in cases where reasonable minds can come to but one conclusion.

I am authorized to say that Justice SIEBECKER and Justice TIMLIN concur in the foregoing dissenting opinion.

A motion that the mandate be modified so as to provide for a new trial was denied April 5, 1911.

RIB FALLS LUMBER COMPANY, Respondent, vs. LESH & MATHEWS LUMBER COMPANY, Appellant.

November 16, 1910—January 10, 1911.

Foreign corporation: Contract void on its behalf: Defenses: Sale of lumber: Delivery of inferior portions: Recoupment: Counterclaim.

1. Under sec. 1770b, Stats. (1898), an unlicensed foreign corporation, when sued upon a contract void in its behalf but enforceable against it, may establish as a defense any facts which will in whole or in part defeat plaintiff's right to recover, but is precluded from obtaining affirmative relief upon any cause of action or counterclaim arising out of the contract.
2. In an action for a balance alleged to be due for lumber delivered under a contract for the sale of the plaintiff's entire stock of

certain kinds of lumber at a specified price for all lumber of each kind graded as "No. 2 common and better," and a lower price for "No. 3 common," the answer alleged that plaintiff had wrongfully abstracted the best and most valuable portions of the lumber graded as "No. 2 common and better," and had delivered only the inferior portions, thereby reducing the value of that which was delivered to an amount much less than the contract price. *Held*, that the facts so alleged constitute a defense which would defeat in whole or in part plaintiff's recovery, and therefore should not be treated as a counterclaim or cross-complaint within sec. 2656, Stats. (1898).

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Reversed.*

This is an action to recover the balance alleged to be due for lumber delivered on a contract. The alleged contract is one for the sale of a stock of lumber to be thereafter manufactured. The contract enumerates the kinds and the estimates of the quantities of the lumber embraced in the contract and continues as follows:

"It is understood that the above amounts are estimated and that the sale and purchase includes all the stock of the different kinds mentioned which the party of the first part will manufacture, during the sawing season of 1908, both at their Barney and Sellin mills. To be loaded on cars at Rib Falls, Wisconsin, by party of the first part.

"The party of the second part agrees to pay the following prices for above stock, F. O. B. cars, Rib Falls, Wisconsin:

Rock Elm.....	No. 2 C & B	$28.00	No. 3 C	$11.00
Basswood	" " " " "	23.00	" " "	14.00
Soft Elm.....	" " " " "	18.00	" " "	9.00
Black Ash.....	" " " " "	25.00	" " "	9.00
White Ash.....	" " " " "	30.00	" " "	9.00"

After stating that the National Hardwood Association rules are to govern, and the sizes into which the lumber is to be cut, the contract continues as follows:

"Terms of payment of any of the above stock that is ordered shipped green from the saw, 60 days from shipment, or 2 per cent. cash discount, 15 days.

"On all lumber that is piled, terms are as follows: All lumber piled previous to March 1st, 1908, in finished piles, is to

be estimated at such date, and second party is to give its note for 60 per cent. of the value of said lumber, based on the above prices, payable four months from such date, without interest. All lumber piled in finished piles during the month of March, is to be estimated April 1st, 1908, second party is to give its note for 60 per cent. of the value of said lumber based on the above prices, payable four months from such date without interest. All lumber piled in finished piles during the month of April, is to be estimated on the 1st of May, and second party is to give its note for 60 per cent. of such value, payable four months from such date without interest. All lumber piled in finished piles during the month of May, is to be carefully estimated on the 1st of June, and second party is to give its note for 60 per cent. of such value, payable four months from such date, without interest. First party agrees to once renew half the above paper, at maturity, for four months, providing the lumber for which such paper has been given shall not have been shipped, such renewal to be at the expense of said second party.

"The remaining 40 per cent. to be settled as the lumber is shipped, terms of such portion, 60 days or 2 per cent. 15 days.

"Any lumber not shipped by or before December 31st, 1908, is to be carefully estimated by both parties at such date and to be then settled for in full, terms 60 days or 2 per cent. 15 days."

Provision is made for the payment of insurance, and the contract then proceeds:

"The party of the second part agrees to pay to the party of the first part 30c per M. for all No. 2 common and better lumber, which is handled the second time in the manipulation of grades.

"The making of the payments mentioned shall be a condition precedent to the further performance of the contract by the first party, and title to the lumber shall remain in first party until the same is loaded, as security for any part of the entire purchase price remaining unpaid."

The plaintiff seeks to recover the amount alleged to be due for lumber delivered on board cars and for lumber piled in the

mill yard, and for the cost of rehandling a part thereof pursuant to this contract.

The answer of the defendant admits the amounts set out by the plaintiff to be correct, but alleges by way of defense that all of the lumber manufactured by the plaintiff and embraced in the contract was not delivered, in that the higher grades of the lumber so manufactured by the plaintiff and included in the term "No. 2 common and better" have been detached from said stock by plaintiff for its own use; that the stock included in the contract has been so depleted by taking therefrom 210,000 feet of the best grades and quality, thereby greatly reducing the value of what was shipped and delivered; that the 210,000 feet of lumber referred to as having been taken from the stock and which were included in the contract were the upper grades and were worth at market value more than the flat or average price fixed in the contract; that by reason of the plaintiff's having so taken and disposed of the best part of this lumber, the lumber delivered is not the lumber embraced in and sold by the contract, but only the poorer and cheaper parts of the grades; that by reason of such depletion of the stock so sold to the defendant the plaintiff is unable to perform the contract; and that the defendant is damaged thereby in the sum of $3,740. The defendant also alleges these facts as a counterclaim, and asks that it may have judgment against the plaintiff for the damages thereby caused to the defendant.

The plaintiff in its reply denies the allegations of the answer as to the better quality of lumber having been detached from the stock so sold the defendant, and alleges that the defendant is a foreign corporation which has not complied with the provisions of sec. 1770*b*, Stats. (1898), so as to authorize it to do business in this state, and that the contract is wholly void as to the defendant but is enforceable against it.

On the trial it appeared that the defendant was a foreign

corporation doing business in this state and that it had not complied with the provisions of sec. 1770*b*, Stats. (1898). The court therefore refused to admit evidence to sustain the defendant's answer and counterclaim.

This is an appeal from the judgment in plaintiff's favor upon the verdict directed by the court.

For the appellant there was a brief by *Regner & Ringle*, attorneys, and *E. M. Smart*, of counsel, and oral argument by *Mr. Smart*.

For the respondent there was a brief by *Kreutzer, Bird, Rosenberry & Okoneski*, and oral argument by *C. B. Bird*.

SIEBECKER, J. The court ruled to exclude all the evidence of the defendant to sustain its answer, upon the ground that it had no license to do business in this state, and hence, under the provisions of sec. 1770*b*, Stats. (1898), as amended, is precluded from asserting a right to any relief in this action. The court was of the opinion that the matters alleged by the defendant in answer to the plaintiff's complaint consisted of new matter which was in its nature and substance an independent cause of action or counterclaim in its favor and hence not enforceable, since the right so asserted arises out of this contract, which is wholly void as to the defendant by reason of its default in not filing a copy of its charter or articles of incorporation with the secretary of state as required by sec. 1770*b*, Stats. (1898). No claim is made that it can, under these circumstances, demand relief by way of counterclaim to plaintiff's alleged cause of action. This is in accord with the decision in *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904.

It is however contended that the answer alleges a defense which, if established, will in whole or in part defeat plaintiff's right to recover upon the cause of action alleged in the complaint. If the answer alleges such a defense to plaintiff's claim, then the defendant is entitled to be heard in the case to

protect itself against any demand of the plaintiff not warranted by law. The right to defend when sued is well established and recognized. As stated in *Windsor v. McVeigh*, 93 U. S. 274, 277:

"Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."

The principle is so well recognized that citation of authority is unnecessary.

The question then is, Does the answer present a defense to plaintiff's cause of action? It is necessary to ascertain the exact state of the pleadings to determine the controversy thus presented. The complaint charges that the plaintiff is entitled to recover a balance due on the purchase price for lumber it has delivered to the defendant pursuant to an alleged contract and that the defendant refuses to pay the same. The material portions of this contract are stated in the foregoing statement of the case. The answer denies that the plaintiff has fully performed all of the agreements of the contract and alleges that the plaintiff failed to deliver all the lumber embraced in the contract. It is admitted that the plaintiff delivered the quantities of lumber specified in the complaint, but it is alleged "that the lumber so delivered was of a poorer quality and grade than that agreed to be delivered by the plaintiff in and by said contract," because the portion delivered by it as part of the 1908 output of its mills as covered by the contract in question had been depleted and damaged by the plaintiff by wrongfully removing therefrom 210,000 feet of the best parts of these grades and qualities, and hence, in violation of the contract of sale, the plaintiff delivered to the defendant only the poorer and inferior part of the grades of the stock manufactured in its mills, and thereby reduced the value of the part delivered to the defendant to an amount

much less than the contract price and less than such grade was worth before such wrongful separation and depletion of the stock.

The contract between the parties includes all the stock of the kinds specified which were to be manufactured by the plaintiff during the sawing season of 1908 and was to be paid for at the stipulated prices for the different kinds of wood, all to be graded as No. 2 common or better and No. 3 common, pursuant to the National Hardwood Association rules. It is alleged that under such grading referred to in the contract the No. 2 common and better lumber consists of grades classed as firsts and seconds and as Nos. 1 and 2 common, that the upper of such grades are of much higher market value than the lower and much higher than the average or flat price fixed in the contract for the entire stock, and that the 210,000 feet so abstracted were the best and most valuable portion of the manufactured stock, of which only the inferior part has been delivered. If these allegations are established it would show that the plaintiff has not fulfilled the stipulations of the contract under which it claims to have delivered the lumber shipped, in that it so manipulated the lumber as to deprive the defendant of the best portions of this stock, which it had agreed to deliver as part of the stock shipped to the defendant. It also appears from these allegations that the price demanded by the plaintiff for the inferior material so delivered is the contract price for the stock including the superior and more valuable portion of this whole stock, so alleged to have been wrongfully converted and sold to other persons, and it is alleged that the plaintiff has thereby rendered itself unable to perform the very terms of the agreement relied on to recover in this action.

In the light of the plaintiff's claim the new defensive matter alleged by the defendant goes in denial of the plaintiff's cause of action and operates to defeat, either in whole or in part, its right to recover. The facts so alleged are a denial

of plaintiff's right to recover the amount alleged to be due under the stipulations of the contract which the plaintiff seeks to enforce. It is asserted by the respondent that the defendant admits having received, pursuant to the contract, the amount of lumber alleged to have been delivered, and therefore that the plaintiff is entitled to recover the full contract price, because the contract is apportionable and obligates the defendant to pay for the portion delivered as a condition precedent to any obligation on its part to make further delivery. The allegations of the answer cannot be so interpreted. The allegations of the answer are clearly a denial of the claim that deliveries were made in compliance with the contract, and the defendant avers that the plaintiff fraudulently defaulted in this respect by so manipulating the output of its mills as to depreciate the grades of the stock it claims to have delivered, thus breaching the very terms of the contract it seeks to enforce against the defendant. Under these circumstances it is the defendant's right to have the amount of the plaintiff's recovery limited to the actual value of the lumber delivered. The wrongful conduct of the plaintiff operates, under the equities of the law, to defeat its claim under the contract by diminishing the amount due for the material delivered under it, and its recovery of the contract price is to be decreased by the loss occasioned by its wrongful conduct in failing to execute the contract. This defense operates to defeat plaintiff's recovery and therefore is not to be treated as a counterclaim or cross-complaint within sec. 2656, Stats. (1898), defining counterclaim, as applied in *Heckman v. Swartz,* 55 Wis. 173, 12 N. W. 439, and similar cases. The declaration that the statutory counterclaim "embraces both recoupment and set-off" must be applied in the sense in which it is employed in the statute and these cases, namely, a cross-demand of the defendant against the award to which the plaintiff is entitled upon the cause of action alleged by him; and the term "counterclaim" must be used as referring to a cause of action of the

defendant constituting a defense for affirmative relief and not as a defense which goes only to defeat the plaintiff's cause of action. Any apparent conflict in views on the subject is due to the fact that "recoupment" has been variously used as a term to define a defense which goes only to diminish the plaintiff's claim for damages and to designate a defense by way of a counterclaim for affirmative relief in reduction of the damages to which the plaintiff is actually entitled upon his cause of action. We consider that the facts alleged in the answer constitute a defense which will defeat, in whole or in part, the amount of plaintiff's alleged cause of action, and hence is strictly new matter constituting a defense. *Washburn v. Dosch,* 68 Wis. 436, 32 N. W. 551; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356.

Appellant concedes that it has no right, under the circumstances of the case, to enforce any affirmative relief upon the independent cause of action arising out of this transaction, and hence this question need not be considered. *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904.

Upon the facts alleged it must be held that the court erred in excluding the evidence offered to sustain the defense alleged in defendant's answer. The allegations charging that the plaintiff disabled itself from delivering the lumber as manufactured by depleting the stock of the best and most valuable portion and by otherwise disposing of such superior parts of such classes and grades, thus diminishing the value of that delivered below the price fixed in the contract, entitled the defendant to show by what amount the value had been diminished, in order to ascertain what amount, if any, the plaintiff was entitled to recover on its cause of action.

By the Court.—The judgment appealed from is reversed and the cause remanded for a new trial.

KERWIN, J., dissents.

ADAMS, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

November 19, 1910—January 10, 1911.

Municipal corporations: Police power: Ordinances regulating sale of milk: Tuberculin test: Classification: Milk produced in and out of city: Destruction of property: Recovery by owner: Evidence: Scientific books.

1. Where there are conflicting scientific beliefs or theories concerning the danger of infection from the use of milk from cows afflicted with tuberculosis and concerning the efficacy of the tuberculin test for the purpose of determining the presence of tuberculosis in cows, the common council of a city authorized by statute to legislate for the protection of the public health may determine upon which of these theories it will base its police regulations, and unless such determination is clearly and manifestly wrong the courts will not interfere with the ordinance on the ground that the scientific theory upon which it is based is incorrect or unsound.
2. Statutes and decisions and evidence referred to go to show a widespread popular recognition of the danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test.
3. Classification for the purpose of valid police regulation may be based upon differences in the opportunity or facility for inspection inherent in the different classes, although danger of infection from each in case of actual contact might be equal.
4. An ordinance which prescribes different police regulations relative to the sale and distribution of milk shipped into the city from those regulations relative to milk produced from cows within the city, is valid.
5. In order to uphold an ordinance which requires for its enforcement destruction of property, a case must be presented in which the usual sanction of fine or imprisonment or the abatement of nuisance by suit in court, or indeed any milder or slower mode of dealing with the offender than destruction of his property, would be inadequate to preserve public health or safety.
6. In all ordinary cases of destruction of property under such authority the property owner may resort to the courts and recover his damages by proving that the property which was destroyed as a nuisance or as dangerous to the public health or safety was not such in fact.

7. Where large quantities of milk are daily shipped into a city by persons residing outside of the jurisdiction of the city officers, the liability of the milk to rapid decomposition, the futility of proceeding by fine and imprisonment against the shipper, carrier, or consignee, and the necessity for effectually preventing any of such milk being used, all establish a situation in which it may be said that the common council had the right to decide that destruction of the milk was the only available or efficient penalty for the enforcement of the ordinance.
8. There is a distinction relative to the power to destroy property in the abatement of existing nuisances and in the abatement of nuisances created by wilfully placing property in the forbidden place or condition after the enactment of an ordinance and in defiance of it. Self-inflicted damage is not recoverable. The open judicial inquiry in such case is, Was the damage self-inflicted?
9. On the trial of a cause before the court without a jury it is not error to receive in evidence scientific books and reports of scientific bodies for the purpose of informing the court. Such books and reports so offered in evidence have only the weight and value of like books and reports read by the court without having been offered in evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan* and *M. A. Jacobson.* They cited, besides other cases, art. XIV, Amendm. Const. of U. S.; secs. 1, 13, art. I, Const. of Wis.; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347; *Potts v. Breen,* 167 Ill. 67, 47 N. E. 81; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Bittenhaus v. Johnston,* 92 Wis. 588, 66 N. W. 805; *Lowe v. Conroy,* 120 Wis. 151, 97 N. W. 942; *State v. Elofson,* 86 Minn. 103, 90 N. W. 309; *State v. Nelson,* 66 Minn. 166, 68 N. W. 1066; *St. Paul v. Peck,* 78 Minn. 497, 81 N. W. 389; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885.

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *John J. Cook,* assistant city attorney, and

oral argument by *Mr. Cook.* They relied upon the same cases; also, *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *Jacobson v. Massachusetts,* 197 U. S. 11, 25 Sup. Ct. 358; *Sanders v. Comm.* 117 Ky. 1, 1 L. R. A. N. S. 932; *State v. Layton,* 160 Mo. 474, 61 S. W. 171; *Nelson v. Minneapolis* (Minn.) 127 N. W. 445; *New Orleans v. Charouleau,* 121 La. 890, 46 South. 911, 18 L. R. A. N. S. 368; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277.

TIMLIN, J. Plaintiff, a farmer residing in Waukesha county and owning a number of cows and engaged in shipping milk from said cows to the city of *Milwaukee* to dealers in that city, brings this suit in his own behalf and in behalf of other producers and dealers in milk similarly situated and engaged, against the city of *Milwaukee* and its commissioner of health to enjoin the enforcement of an ordinance, the material provisions of which are as follows:

"No person shall bring into the city of *Milwaukee* for sale, either by wagon, cart, train, or any other kind of vehicle, or keep, have or offer for sale or sell in said city, any milk or cream drawn from cows outside of said city, contained in cans, bottles or packages, unless such cans, bottles or other packages containing such milk or cream for sale, shall be marked with a legible stamp, tag or impression bearing the name of the owner of such cow from which such milk was drawn, giving his place of business, including the name of city, street and number, or other proper address, and unless the owner or owners of such cows shall, within one year from the passage of this ordinance, file in the office of the commissioner of health a certificate of a duly licensed veterinary surgeon, or of any other person given authority by the State Livestock Sanitary Board to make tuberculin tests, stating that such cows have been tested with tuberculin and found free from tuberculosis or other contagious diseases. . . . Such certificate shall be good for one year from date of its issuance, . . . must be renewed annually, . . . shall show in each case that the animals from which such milk was drawn are free from tuberculosis or

other contagious diseases. All milk and cream from sick and diseased cows, . . . or which does not conform to all other provisions of this chapter, shall, upon discovery thereof, be confiscated, forfeited and immediately destroyed by or under the direction of the commissioner of health, bacteriologist, or officer detailed, who shall, if done in good faith, be held harmless in damage therefor."

Considerable difference of opinion appears to exist among those having a reputation for learning with respect to the efficacy of the tuberculin test for ascertaining the presence of tuberculosis in cattle. This test is made by an hypodermic injection of a toxic product of the tubercle bacilli, which causes a described and recognized rise of temperature in the animal afflicted with tuberculosis, but has no effect, or a different effect, upon cattle not so afflicted. It seems to be agreed, at least in this case, that the bovine type of tubercle bacillus is in form and otherwise distinguishable from the human type by miscroscopic examination. It is claimed by some that the bovine type of tuberculosis is not ordinarily communicable to the human system, in the absence of abrasion, through the alimentary canal. There is also a lack of evidence to establish that tuberculosis of the human lungs, or consumption as it is commonly called, in its ordinary form is caused by the bovine type of bacillus. Nevertheless the prevention of this common and usually fatal disease is by some of the experts put forward as a ground of support for the ordinance in question. There is evidence, and also findings, to the effect that tuberculosis generally is a disease caused by micro-organisms known as tubercle bacilli; that there is a mammalian type of these bacteria subdivided into bovine and human bacilli, and that human beings are susceptible to infection from the bovine tubercle bacilli by ingestion, inhalation, or inoculation. This bovine tuberculosis is communicable to the human being through the medium of milk or its products taken as food. Bovine tuberculosis prevails among cattle in the country adjacent to *Milwaukee*. The tuberculin

test, while not infallible, is the only reliable and useful means for testing cattle for tuberculosis. It is, however, not necessary to support the ordinance in question to show that human pulmonary tuberculosis is caused by drinking the milk of cows afflicted with bovine tuberculosis. If the milk of such cows produces disease of any kind, or is harmful to health, this is a sufficient basis for police regulation of its sale and distribution in the city. There is much evidence to the effect that the use of such milk as a beverage does cause in the human being, especially in infants, bovine tuberculosis, and one of the learned witnesses goes so far as to suggest that the bovine type of tubercle bacillus may or will by successive cultures or transplanting change into the human type. On the whole there is evidence to support the findings of the learned circuit court that the use of milk from such diseased cows is inimical to health. Counsel for respondents call our attention to ch. 542, Laws of 1909, and to the following statutes of other states, recognizing the efficiency of this tuberculin test: Indiana, ch. 181, Laws of 1909; Delaware, ch. 122, Laws of 1909; Maine, ch. 133, Laws of 1909; Maryland, ch. 466, Laws of 1910; Michigan, ch. 172, Laws of 1909; Minnesota, ch. 392, Laws of 1909; New York, pp. 27–29, vol. 1, Consolidated Laws of 1909; North Dakota, ch. 160, Laws of 1909; Oregon, ch. 213, Laws of 1909; South Carolina, ch. 131, Laws of 1909; South Dakota, ch. 291, Laws of 1909; Tennessee, ch. 475, Laws of 1909; Vermont, ch. 163, Laws of 1908; Virginia, ch. 335, Laws of 1910. We are also referred to the cases of *State v. Nelson,* 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318; *Nelson v. Minneapolis* (Minn.) 127 N. W. 445; and *New Orleans v. Charouleau,* 121 La. 890, 46 South. 911, 18 L. R. A. N. S. 368.

The evidence and findings in the instant case, this legislation, and these decisions, go to show a widespread recognition of the danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test. When there are conflicting

scientific beliefs or theories in such matters it is for the city council to determine upon which theory it will base its police regulations, and unless it is clearly and manifestly wrong it is not for the courts to interfere on the ground that the scientific theory on which the ordinance is based is incorrect or unsound. *Jacobson v. Massachusetts,* 197 U. S. 11, 25 Sup. Ct. 358; *Sanders v. Comm.* 117 Ky. 1, 1 L. R. A. N. S. 932; *State v. Layton,* 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163. We also consider the enactment of such ordinances, generally speaking, within the power of the common council of the city of *Milwaukee* under sec. 3 and subds. 9, 23, and 40 thereof, in ch. 4 of the city charter.

It is next contended that this ordinance is void as contrary to the constitution of the United States and of this state, in that it is partial and unequal in its operation. It applies to dealers in milk drawn from cows outside of the city of *Milwaukee,* while dealers in milk drawn from cows within the city are not included in the terms of the ordinance or subject to its requirements. It is not denied that reasonable classification may be resorted to, but it is argued that this is not reasonable classification. If we should consider only the danger to health or the liability to communicate tuberculosis from the bovine to the human animal this position would be unanswerable. But when we consider these two classes of milk dealers from the viewpoint of facility for inspection and regulation, important differences are at once perceptible. The city officials intrusted with the preservation of the public health cannot visit or exercise authority on the farms lying outside of the city limits and in other counties. Milk so brought into the city is a mixture, the product of many different cows mixed in the same can or other receptacle. The bacillus of bovine tuberculosis is a micro-organism invisible to the naked eye, and its presence in milk is difficult of detection by microscopic examination. With the required high-power miscroscope a very small quantity of the milk will exceed in area the entire

miscroscopic field and in that there may not be a single bacillus, while if we were to take up the contents of the can or other receptable drop by drop with such microscope there might be discovered in the whole can enough of the bacilli to condemn the milk. There are brought into *Milwaukee* from outside the city about 28,000 gallons of milk every day, drawn from more than 10,000 cows. It would be practically impossible to subject this quantity of milk to a microscopic examination or to subject it to what is called in the evidence the centrifugal test, which would also require the use of a microscope although not to the same extent. Each animal within the city can be subjected to an individual examination, a microscopic test of samples of its milk, an inspection as to its condition of health, and the tuberculin test applied directly under the orders of the health commissioner. This is a sufficient basis for separate legislation relating to milk shipped into the city. There are other regulations covering the sale of milk drawn from cows kept within the city.

It appears from other sections of the ordinance in evidence relating to cows within the city that the sale of milk from sick or diseased cows is forbidden, and that if in the opinion of the commissioner of health, bacteriologist, or any inspector any cow is afflicted with a contagious or infectious disease, such cow is to be removed to a place where it will not spread the infection. It also appears that cows within the city and the milk and cream therefrom are under the authority of the commissioner of health and subject to strict inspection. Under these ordinances the commissioner of health has very general authority and may no doubt apply any effective and known test to determine whether the animal so inspected is afflicted with tuberculosis or other disease. These differences in the situation of the milk-producing animals and in the facilities for inspection and investigation are sufficient to authorize the common council to legislate with reference to milk shipped into the city and make police regulations applying to

dealers in and shippers of such milk separate from and different from the regulations applying to cows within the city. *Servonitz v. State,* 133 Wis. 231, 113 N. W. 237; *State v. Evans,* 130 Wis. 381, 110 N. W. 241.

It is next contended that the ordinance is void because authorizing the taking of private property without due process of law, contrary to the XIVth amendment to the federal constitution and to sec. 13, art. I, of the state constitution. In support of this it is urged that the findings of the court below establish that the plaintiff maintains a cleanly dairy farm and sells the milk from healthy cows, and that the ordinance requires the confiscation and destruction of this milk without judicial determination of its unwholesomeness or judicial determination that the milk is in fact unwholesome or produced from diseased cows. When authorized by legislation, whether contained in the municipal charter or in general statutes, municipal corporations may enact and enforce ordinances for the abatement of public nuisances and the preservation of the public health. When the nuisance is abated by destruction of property there must exist a necessity for resorting to this drastic and unusual method of enforcement. A case must be presented in which the usual sanction of fine or imprisonment, or the abatement by suit in court, or indeed any milder or slower mode of dealing with the offender than destruction of his property, would be inadequate to preserve the public health or safety. *Salus populi suprema lex.* And in all ordinary cases of destruction of property under such authority the property owner may resort to the courts and recover his damages by proving that the property which was destroyed as a nuisance or as dangerous to the public health or safety was not such in fact. *Fath v. Koeppel,* 72 Wis. 289, 39 N. W. 539, as explained and limited in *Lowe v. Conroy,* 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907; *Hubbell v. Goodrich,* 37 Wis. 84; *Godsell v. Fleming,* 59 Wis. 52, 17 N. W. 679; 1 Am. & Eng. Ency. of Law (2d ed.) 93. In this way the law at-

tempts to harmonize the clash of legal rules and vindicate at once the right of property, including the right of the owner thereof to due process of law, and also the public right to preservation of its health and safety. The situation here disclosed, with about 3,500 eight-gallon cans of milk arriving daily in the city; the fact that the milk will sour and become practically worthless as a beverage in twenty-four hours or less of summer weather; the impossibility of imposing or enforcing fines provided in a city ordinance upon shippers residing and remaining out of the city; the fact that imprisonment of the offender would not prevent the milk reaching the consumer; the futility of proceeding by fine and imprisonment against the carrier or consignee; the impossibility of allowing this enormous quantity of milk to remain at the delivery depots reeking and rotting, a breeding place for pathogenic bacteria and insects during the period necessary for notice to the owner, and resort to judicial proceedings; together with the necessity for effectually preventing any of such milk from being used,—all establish a situation in which it may be said that the common council had the right to decide that destruction of the milk is the only available or efficient penalty for the enforcement of the ordinance and that such destruction was necessary. We cannot declare the ordinance unreasonable in this particular. *Nelson v. Minneapolis* (Minn.) 127 N. W. 445; *New Orleans v. Charouleau,* 121 La. 890, 46 South. 911, 18 L. R. A. N. S. 368.

We do not find it necessary to decide in this case whether the plaintiff could recover from the health commissioner or from the city for the destruction of his milk in case he should be able to prove that the milk was in fact clean, healthful, and free from the bacilli of tuberculosis. In determining the validity of this portion of the ordinance which provides for the destruction of property we must assume that the ordinance is otherwise valid. The plaintiff himself must by his own act expose his property to confiscation before this portion of the

ordinance will affect him injuriously, and there is a distinction recognized in some cases between pre-existing nuisances, abatement of which is sought, and nuisances created by wilfully placing property in the forbidden place or condition after the enactment of an ordinance and in defiance of it. *Blanke v. Genoa Junction,* 140 Wis. 211, 121 N. W. 132; *Miller v. Valparaiso,* 10 Ind. App. 22, 37 N. E. 418; *Baumgartner v. Hasty,* 100 Ind. 575; 1 Am. & Eng. Ency. of Law (2d ed.) 89, 93; *Childs v. Nelson,* 69 Wis. 125, 33 N. W. 587. We cannot, however, presume that the plaintiff will disregard the ordinance here held to be valid or place his property in a condition to invite its destruction. Self-inflicted damage is not recoverable. The open judicial inquiry is in such case, Was the damage self-inflicted?

With reference to the rulings on the admission of hearsay evidence from books and reports of scientific bodies: Where the trial is before the court without a jury the admission of such evidence is merely a mode in which the court may inform itself upon scientific subjects. The books, reports, etc., may be consulted without having been offered in evidence and it can do no harm to receive them in evidence. We cannot presume that the court gave them undue credence merely because they were formally offered in evidence. We find no ground for reversal of the judgment.

By the Court.—Judgment affirmed.

HERRMANN, Respondent, vs. HERRMANN, Appellant.

December 6, 1910—January 10, 1911.

Divorce: Division of husband's estate.

In an action in which both parties asked for a divorce on the ground of cruel and inhuman treatment by the other, it is *held,* upon the evidence, that the divorce was properly granted to the wife and that an award to her of $3,500 as a final division of the husband's estate (valued at $25,000 to $30,000) should not be disturbed upon an appeal by her.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action for divorce on the ground of cruel and inhuman treatment, in which the defendant counterclaimed and asked a divorce from the plaintiff on the same ground. The plaintiff was a widower forty-seven years old at the time of his second marriage in January, 1907. His first wife died in 1905. There were three children born of the first marriage, two girls and a boy. At the time of the trial of this action in October, 1909, one of the girls was eighteen years old, the other thirteen, and the son sixteen. The plaintiff had an estate valued at from $25,000 to $30,000, the greater part of which he had inherited, and an income of $1,600 to $1,700 per year. He had run a farm in Washington county, but he had sold the farm and for some years had lived on a six and one-half acre tract of land near the village of North Milwaukee. He kept a cow and horse and raised some fruit and vegetables on his place.

The defendant had been previously married, but had obtained a divorce from her first husband on the ground of non-support. She had one son who was about eighteen years of age at the time of her marriage to the plaintiff. She became acquainted with the plaintiff in 1902, while the plaintiff's first wife was living, and from that time until their marriage in January, 1907, she gave his daughters piano lessons at their home. She was afflicted with goitre, which made it impossible for her to do hard physical work and which also made her nervous and irritable. This condition was aggravated by some temporary ailments.

Prior thereto the parties conferred as to their prospective marriage and arranged that the defendant should have assistance for the performance of the household labor so that she might give proper attention to caring for the plaintiff's children in so far as her condition warranted. It was agreed that the defendant should not be required to do hard physical work and that a servant should be employed for this service.

The marriage occurred in January, 1907. There is evidence tending to show that the house of the plaintiff was meagerly and poorly furnished at the time of the marriage and that the children had insufficient and poor clothing. It appears that the plaintiff wished to restrict the use of provisions in the home, wanted personally to handle and settle the accounts, refused to leave ready money for household expenses when he was away, and that he was unwilling to give the defendant money with which to make purchases of clothing and food and household necessities, such as she deemed necessary. Within less than two months after the marriage the parties quarreled about money matters; later such quarrels became frequent. The defendant took money from the safe of the plaintiff, sometimes with his knowledge and consent, but at least on one occasion without such knowledge, and this led to disputes and quarrels. The defendant finally left the plaintiff and commenced a suit for divorce. This action was dismissed after an adjustment by which the plaintiff was to give the defendant $15 per month for her personal expenses. This was done for some time, but differences arose between them because of the attempt of the plaintiff to deduct certain sums which he claimed to have paid for her from the sum to be given the defendant.

Shortly after the marriage household goods belonging to the defendant and stored in Chicago were brought to the home at the plaintiff's expense. The arrangement of these goods in the house was the cause of serious differences between the parties. As a result of their quarrels the plaintiff published a notice forbidding any one to give the defendant credit in his name, notified merchants personally not to allow her to have goods, ordered the children to disregard the orders of the defendant, and on two occasions struck her. The defendant scolded and called the plaintiff names. When assistance for the performance of the household labor was not furnished she expressed her disapproval of the plaintiff's elder daughter

doing the housework and characterized the worker as a slob. The defendant did little of the housework aside from the making of her own bed, assisting in doing the finer cooking, and occasionally the getting of a meal.

The court found that there was no issue of this marriage; that the plaintiff struck the defendant on two occasions without just cause or provocation, one time with a whip; that he had humiliated her by forbidding that credit be given her; that he annoyed and mistreated her in divers ways; that he continually interfered with her while she was directing the performance of the household duties; and that the treatment of the defendant by the plaintiff had aggravated her nervous condition and illness. Judgment of divorce was granted the defendant and a final distribution was made of the plaintiff's estate.

This is an appeal from that part of the judgment of the court granting the defendant $3,500 of the plaintiff's estate in making the final division and distribution.

Andrew Gilbertson, for the appellant.

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *Geo. E. Ballhorn.*

SIEBECKER, J. The defendant assails that part of the judgment allowing her the sum of $3,500 out of the plaintiff's estate as a final division and distribution thereof. The statute provides that such award shall be made with "due regard to the legal and equitable rights of each party" in the light of all the attending circumstances showing the character and situation of the parties, their estates, and his ability. Sec. 2364, Stats. (1898). The foregoing statement of the facts, conditions, and circumstances on which the trial court acted in making the award show that the two years of married life of the parties was devoid of all co-operation between the husband and wife for fostering and promoting their mutual interests or those of the plaintiff's children. The court found the plaint-

iff's conduct violative of his duties as husband, that the defendant was entitled to a decree divorcing them from the bonds of matrimony, and that a decree for a final division and distribution of his estate would further their respective interests. Upon all of the facts shown we are led to the conclusion that the judgment was warranted. In the light of the case presented we do not feel justified in holding that the trial court's award is an unjust one, and we cannot, therefore, disturb it on this appeal.

By the Court.—Judgment affirmed.

KLOTZ, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

December 6, 1910—January 10, 1911.

Appeal: Review: Exceptions: Record.

An order directing a verdict cannot be reviewed on appeal from the judgment unless exception to such order was taken at the trial.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries. The negligence charged is that the motorman so unskilfully and negligently managed the car of the defendant as to strike the rear wheel of the vehicle in which the plaintiff was driving, throwing her forward upon the dashboard and thereby causing the injury. The answer is substantially a general denial. The issues involved are the negligence of the defendant, contributory negligence of the plaintiff, and the amount of damages. At the close of the evidence the court directed a verdict for the defendant on its motion. No objection was made to this motion on the part of the plaintiff, and no exception

taken to the order granting it at the time it was granted or during the trial. The bill of exceptions does not show any exception, but it seems that after the trial an exception was filed which appears in the record and which it is stipulated may be treated as an exception after trial. Judgment was entered dismissing the plaintiff's complaint with costs, from which this appeal was taken.

Harry M. Silber, for the appellant.

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *James D. Shaw.*

KERWIN, J. An order directing a verdict cannot be reviewed in the absence of an exception to such order. *Miller v. Kenosha E. R. Co.* 135 Wis. 68, 71, 115 N. W. 355; *Beebe v. M., St. P. & S. S. M. R. Co.* 137 Wis. 269, 118 N. W. 108; *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99. That is the only order attempted to be reviewed here. No exception was filed in the instant case until after trial, and such exception is not sufficient. *Jenks v. State,* 17 Wis. 665; *Firmeis v. State,* 61 Wis. 140, 20 N. W. 663; *Adams v. McKay,* 63 Wis. 404, 23 N. W. 575. It follows that we cannot review the order directing a verdict.

By the Court.—The judgment of the court below is affirmed.

STATE EX REL. CITY OF MILWAUKEE, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

December 6, 1910—January 10, 1911.

Mandamus: *When lies: Public and continuous duties: Moot questions: Parties: Municipal corporations: Powers: Requiring street railway companies to sprinkle streets: Ordinances: Repeal: Police power: Reasonable regulations: Classification: Discrimination: Enactment of ordinances creating liability: Vote and record.*

1. A city ordinance requiring a street railway company to sprinkle the streets between and for a certain distance on either side of its tracks imposes a duty which is public in its nature, the object being to preserve the public health and promote its comfort, even though the city might, perhaps, have authority to charge the whole or a part of the expense of sprinkling to abutting owners. Such a duty may properly be enforced by *mandamus.*
2. *Mandamus* will lie to enforce the performance of a continuous legal duty.
3. Where a street railway company has disregarded for five years a city ordinance requiring it to sprinkle streets and in a *mandamus* proceeding contests the right of the city to require it to do any sprinkling at any time in the future, it cannot be held that the proceeding presents only a moot question, although it does not appear that the company does not intend to do the sprinkling in the future.
4. A city has such an interest in the sprinkling of its streets, both from its interest in the public health and from the pecuniary saving to it of the expense of sprinkling the street crossings, as makes it a proper relator in such a *mandamus* proceeding, notwithstanding abutting property owners may also be benefited by being relieved of a burden which might otherwise be imposed on them.
5. An ordinance of the city of Milwaukee, adopted in 1902, requiring the sprinkling of streets by a street railway company, was included in a general revision of the ordinances passed in 1906, but the rules regulating such sprinkling, adopted under the ordinance by the board of public works and approved by the common council, were not included in such revision. It was, however, expressly provided therein that all ordinances prescribing any rules, regulations, or restrictions upon street railway

companies were not repealed. *Held*, that this provision was sufficiently broad to save the rules if they became part of the ordinance, and, if they did not, then obviously they were not repealed.

6. An ordinance of the city of Milwaukee passed in 1902, requiring the sprinkling of streets by a street railway company, was not repealed by ch. 501, Laws of 1909, which provides that the common council of any city of the first class *may* cause its streets to be sprinkled during the current year and charge the cost thereof, with certain exceptions, to the abutting owners, and which is amendatory of existing charters only so far as they are inconsistent therewith and expires by limitation on December 31, 1910. The authority conferred by the latter act was only cumulative and supplementary to existing rights.

7. Repeals by implication are not favored, and where there are two affirmative statutes on the same subject one will not repeal the other if both can stand together.

8. An ordinance providing permanently for the sprinkling of streets by a street railway company was not repealed by a mere resolution of the common council, passed pursuant to ch. 501, Laws of 1909, during the pendency of an action against the street railway company to enforce performance of such duty, directing the board of public works to sprinkle such streets for a period of three and one-half months and charge the expense to the abutting owners.

9. Under sec. 1862, Stats. (1898), providing that street railway companies shall be "subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe," it is not necessary that the "regulations" referred to be passed when the right to use the streets is granted. The only limitation is that the regulations must be reasonable.

10. Only in a case which is clear beyond a reasonable doubt will the courts declare void an ordinance adopted under the police power in the interest of the public health.

11. An ordinance requiring a street railway company to sprinkle the parts of the streets immediately adjacent to their tracks is not unreasonable, provided the power is exercised in a proper manner.

12. Such an ordinance is not unreasonable because it requires the sprinkling to be done in such a manner as will keep the surface continually moist and prevent the dust from arising at all times each day when the work is done, "but not in such a manner as to create mud or pools of water." Reasonably interpreted, this

only means that the company must exercise ordinary care and caution in doing the work, not that the street must be entirely free from mud or from small pools of water.

13. Among the different users of the public streets, street railways are in a class by themselves, and an ordinance which requires them to sprinkle parts of the streets is not void as being discriminatory, although no such duty is imposed upon other users.

14. A provision of a city charter requiring an "aye" and "no" vote to be taken on all ordinances or resolutions for the appropriation or disbursement of money, or creating any liability or charge against the city, and that such vote be entered at length upon the journal, is mandatory, and in a case coming within its terms it is not sufficient that the facts can be ascertained from the clerk's original minutes.

15. The word "liability" as used in such city charter means something more than a mere undertaking on the part of the city which may involve no expense to it at all, such as a provision that a city owning and operating its own waterworks shall furnish water free for street sprinkling, and an ordinance containing such an undertaking does not require an "aye" and "no" vote.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

On July 14, 1902, the common council of the city of *Milwaukee* passed an ordinance requiring all street railway companies operating lines in the city to sprinkle with water the entire roadbed of the railways operated, between single tracks and double tracks and one foot outside of all tracks, as well as the space between double tracks, such work to be done under the general supervision of the board of public works and under rules and regulations adopted from time to time by said board and approved by the common council. Street railway companies were not required to do any sprinkling between November 1st and the 1st day of April following. The entire expense of such sprinkling was to be borne by the street railway companies, except that the city was to furnish the necessary water free of charge. The ordinance also provided that any violation thereof should be punished by a fine not exceeding $300 and costs.

No rules or regulations were adopted by the board of public works until July 10, 1905. Among other things, the rules adopted provided that the sprinkling called for by the ordinance should be done on all days from and including April 1st to November 1st in each year, excepting Sundays and legal holidays and such days as sprinkling was unnecessary by reason of rain or the moist condition of the streets; that sprinkling should be done in such manner and at such intervals as would keep the surface moist and prevent dust from arising between 6 a. m. and 7 p. m. upon each day when the work was required to be done, but not in such a manner as to create mud or pools of water, and that paved streets should be sprinkled lightly to meet the requirements, but graveled or macadamized streets should be thoroughly wetted down. The rules adopted by the board of public works were approved by the common council shortly thereafter. The defendant refused to comply with the ordinance and the rules adopted in pursuance thereof, and the city, on September 21, 1905, commenced a *mandamus* proceeding to compel the defendant to comply with the terms of the ordinance. From a judgment in relator's favor the defendant or respondent in the court below prosecutes this appeal.

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *J. B. Blake* and *Geo. P. Miller.*

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *John J. Cook,* assistant city attorney, and oral argument by *Mr. Cook.*

BARNES, J. Nine distinct reasons are advanced by the appellant in support of its contention that the judgment appealed from should be reversed. These are: (1) *Mandamus* is not the proper remedy. (2) The city of *Milwaukee* is not the proper relator. (3) The rules adopted by the board of public works were not included in the 1906 revision of the

charter of the city of *Milwaukee* and were therefore repealed thereby. (4) Ch. 501, Laws of 1909, repealed the street-sprinkling ordinance. (5) The street-sprinkling ordinance became inoperative because of a resolution adopted by the city council acting under ch. 501, Laws of 1909. (6) The city had no power conferred on it to pass an ordinance requiring street railway companies to sprinkle any portion of the public streets. (7) The ordinance is void because its requirements are unreasonable. (8) It is void because it is discriminatory. (9) It was never lawfully passed.

1. It is argued that *mandamus* will lie only to enforce a clear legal duty, and that no such duty is shown to exist in this case; that the duty imposed is not a public one and therefore performance will not be enforced by *mandamus;* that *mandamus* will not lie to enforce the performance of a continuous act; and that it will not lie because the case presents a moot question only.

Whether a clear legal duty was imposed on the appellant by the ordinance involved depends on the solution of various legal questions that will hereafter be discussed.

We entertain no doubt that the duty attempted to be imposed is of a public nature. The mere fact that the whole or a portion of the expense of sprinkling might be charged to an abutting owner does not determine the nature of the duty. Public streets are built at the expense of abutting property owners where the cost does not exceed the resulting benefits, but the building of streets is none the less a public duty. Sidewalks are built and sewers are constructed in whole or in part at the expense of the abutting owner, regardless of special benefits. This is done by virtue of the police powers lodged in cities and villages, but the duty is as much a public one as if the cost had been defrayed by means of general taxation. It is somewhat difficult to see wherein any special benefit accrues to the abutting owner by reason of the street in front of his property being sprinkled. In any event the

public shares in the benefit. The ordinance was passed to preserve the public health and to promote its comfort, and manifestly such an ordinance operates in the interest of and for the benefit of the public.

Neither do we see any good reason for saying that relief should not be afforded by *mandamus* because the duty to sprinkle is a continuous one. If the legal duty on the part of the appellant is clear, the relator should not be denied an appropriate remedy because the right sought to be enforced is not of a temporary nature. There can be no more objection to a court of law granting permanent relief by *mandamus* in an appropriate action than there is to a court of equity granting relief in a proper case by a mandatory injunction. The cases of *State ex rel. Star Pub. Co. v. Associated Press,* 159 Mo. 410, 60 S. W. 91; *Diamond M. Co. v. Powers,* 51 Mich. 145, 16 N. W. 314; *State ex rel. Rosenfeld v. Einstein,* 46 N. J. Law, 479; and *People ex rel. Nat. C. Co. v. Dulaney,* 96 Ill. 503, cited by the appellant, are for the most part cases where under the established facts the right to the continuous or perpetual relief sought was not sufficiently clear to warrant the judgments prayed for. That *mandamus* will lie to enforce the performance of a continuous legal duty has been decided at least by inference by this court. *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.* 87 Wis. 72, 57 N. W. 970. Such is the general current of authority elsewhere. *Potwin Place v. Topeka R. Co.* 51 Kan. 609, 33 Pac. 309; *State ex rel. Bridgeton v. Bridgeton & M. T. Co.* 62 N. J. Law, 592, 43 Atl. 715; *Detroit v. Ft. W. & B. I. R. Co.* 95 Mich. 456, 54 N. W. 958; *Oklahoma City v. Oklahoma R. Co.* 20 Okla. 1, 93 Pac. 48; *State ex rel. Ellis v. Atlantic C. L. R. Co.* 48 Fla. 114, 40 South. 875.

The contention that the case presents only a moot question we do not take seriously. It is true that the appellant is not required by the ordinance to do any sprinkling between November 1st and April 1st, and appellant may conclude to

comply with its terms beginning April 1st next. This ordinance, if valid, became operative more than five years ago and no sprinkling has been done thereunder as yet. Furthermore, the appellant is in court vigorously contesting the right of the city to require it to do any sprinkling thereunder at any time in the future. In view of the situation the city is entitled to have its rights under the ordinance judicially determined.

2. It is argued that the city has no financial interest in the result of the suit and that the only ones who have are the abutting owners who will be relieved of their burden by the enforcement of the ordinance, and that the city therefore is not a proper relator. This argument seems to be based on the proposition that street sprinkling is a private matter which inures to the benefit of the abutting owner and which affects the public in an incidental way only. We have already said that the duty imposed is a public one, and, while the cost may possibly be charged to the lotowner, a point we do not decide, yet the special benefit that accrues to his property may be very slight, if indeed any. If we except ch. 501, Laws of 1909, which will be discussed later, there is no statute which compels or obligates or in express terms authorizes the city to impose on abutting property owners the burden of sprinkling. The city is authorized by its charter to provide for street sprinkling, and we see no objection to its providing that the expense thereof be met by general taxation. It may be that the city would be restricted to this method of raising the necessary fund to defray the cost of the work. Indeed, under the provisions of the 1909 law the city is directly and pecuniarily interested in requiring street-car companies to comply with the ordinance, because it must bear the expense of sprinkling the street crossings, which make up a very considerable fraction of the entire street surface in the city. Besides, the ordinance we are considering purports to be passed in the interest of public health, and the trial court found as a matter of fact that the circulation of dust was injurious to

public health and that disease-breeding germs were carried therein. There is no difference in principle between the case at bar and *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534, 43 N. W. 489, where the court at the suit of the city compelled the railway company to restore a highway used by it to its former state of usefulness. In some respects the present case is stronger, in that it involves the matter of public health. Other cases holding that the city is a proper relator in such a case are: *State ex rel. Bridgeton v. Bridgeton & M. T. Co.* 62 N. J. Law, 592, 43 Atl. 715; *Chicago, B. & Q. R. Co. v. State ex rel. Omaha,* 47 Neb. 549, 66 N. W. 624; *State ex rel. Rutherford v. Hudson River T. Co.* 73 N. J. Law, 227, 63 Atl. 84; *Pleasantville v. Atlantic City & S. T. Co.* 75 N. J. Law, 279, 68 Atl. 60; *State ex rel. New Orleans v. N. O. & N. E. R. Co.* 42 La. Ann. 11, 7 South. 84; *Potwin Place v. Topeka R. Co.* 51 Kan. 609, 33 Pac. 309; *International W. Co. v. El Paso,* 51 Tex. Civ. App. 321, 112 S. W. 816.

3. In 1906 an ordinance was passed by the city of *Milwaukee* to revise, consolidate, and amend the general ordinances of the city. The ordinance requiring the appellant to sprinkle was included in the revision, but the rules adopted by the board of public works under said ordinance in 1905 were not included therein, and hence it is claimed that such rules were repealed by it. The rules adopted by the board of public works having been ratified and approved by the common council, they became to all intents and purposes part and parcel of the ordinance passed by the common council on July 14, 1902, and really make it complete. The revision does not in express terms purport to repeal the rules adopted and approved as stated, although they do not appear as part of the ordinance therein. But sec. 3 of ch. 30 of the revision expressly provides that all ordinances prescribing any rules, regulations, or restrictions upon street railway companies are not repealed. This provision we deem sufficiently broad to save the rules. If they did not become a part of the ordinance,

then obviously they were not repealed. The court found that the rules were not repealed by reason of the 1906 codification of the charter provisions, and no exception is taken to such finding, so the question is not really before the court.

4. Ch. 501, Laws of 1909, authorized the common council of any city of the first class to provide whether the streets of such city should be sprinkled during the current year, and to charge the cost thereof, with certain exceptions, to the abutting owners in case it decided to sprinkle. The act was made amendatory to existing charters only so far as they were inconsistent with the act, and it was provided that the law should expire by limitation on December 31, 1910. It is argued that this act repeals the ordinance under consideration.

The argument is not convincing. In the first place, the act provides that the common council *may* provide for street sprinkling. Then it recites that it modifies or repeals existing charter provisions only in so far as they are inconsistent therewith. Furthermore, the act has already expired by limitation, and if it should be construed to supersede all existing charter provisions relative to street sprinkling we would have neither a law nor an ordinance on the subject until one was passed. These considerations are strongly suggestive of a legislative intent to permit existing laws and ordinances on the subject to stand unless they were actually repugnant to the law in question. It is apparent that former laws which confer the power on cities of the first class to proceed in some other way are not inconsistent with the later act. The authority thereby conferred is merely cumulative and supplementary to existing rights. If there was a repeal of the ordinance in question it must have been by implication, as it was not repealed by any affirmative declaration contained in the 1909 law. Repeals by implication are not favored. The earlier act remains in force unless it is manifestly inconsistent with or repugnant to the later one, or unless some express notice is taken of the former act in the later one which

plainly indicates an intention to abrogate it. *State ex rel. M., T. & W. R. Co. v. Tomahawk Com. Council,* 96 Wis. 73, 71 N. W. 86. Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together. *Att'y Gen. ex rel. Taylor v. Brown,* 1 Wis. 513; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425. The implication to be operative must be necessary, and if it arises out of two acts the later abrogates the older one only to the extent that it is inconsistent and irreconcilable with it. The two statutes will if possible be construed so as to stand together. 1 Lewis's Sutherland, Stat. Constr. (2d ed.) p. 465; Maxwell, Interp. of Stats. (4th ed.) 233; Black, Interp. of Laws, sec. 53. Other Wisconsin cases illustrating the foregoing rules of statutory construction are *Goodrich v. Milwaukee,* 24 Wis. 422; *Foster v. Hammond,* 37 Wis. 185; *Vorous v. Phenix Ins. Co.* 102 Wis. 76, 78 N. W. 162; *Bradley v. Cramer,* 61 Wis. 572, 21 N. W. 519; *First Nat. Bank v. Baker,* 68 Wis. 442, 32 N. W. 523; *Peterson v. Baker,* 68 Wis. 451, 32 N. W. 527. The exception, if such it may be called, is that where the legislature legislates on a given subject, and it is manifest that it intended to revise and codify all existing laws and to cover the entire subject, former acts dealing with such subject will be deemed to have been impliedly repealed although there is an absence of an express repealing clause. *Gymnastic Asso. v. Milwaukee,* 129 Wis. 429, 109 N. W. 109. No such purpose is apparent in ch. 501, Laws of 1909. In fact the intention appears to be quite to the contrary.

5. Acting under the power conferred by ch. 501, Laws of 1909, the common council of the city of *Milwaukee* on July 6, 1909, passed a resolution authorizing and directing the board of public works to sprinkle certain streets in the city until October 15, 1909, and to charge the expense of such sprinkling to the abutting owners. The resolution further provided that the cost of sprinkling streets at the intersection

thereof should be paid out of the street or alley fund. It is argued that this resolution had all the dignity, force, and effect of an ordinance; that it covered all streets upon which appellant maintained a street railroad, as well as the entire width of such streets; and that it operated to repeal the ordinance of July 14, 1902.

Too much is claimed for this resolution. The appellant refused to comply with the 1902 ordinance. This action was brought to compel it to do so and was pending in the courts. Until it was decided the city must either make some other provision for sprinkling or allow the portion covered by the 1902 ordinance to go unsprinkled. It would not have availed much to sprinkle the balance of the street. To meet the situation the city adopted a temporary expedient covering a period of less than three and one-half months. This was not intended to and in fact did not repeal the original ordinance, which made permanent provision for sprinkling that portion of the street occupied by the appellant.

6. The next contention is that there was no authority conferred on the city of *Milwaukee* to pass the ordinance in question. The city justifies its action on three grounds: (1) A provision in its charter authorizing it to provide for the sprinkling of streets; (2) broad police powers conferred on it empowering it to pass legislation abating nuisances and conserving the public health; (3) sec. 1862, Stats. (1898).

The statute referred to provides for the organization of corporations to construct, operate, and maintain street railway lines, and authorizes any municipal corporation to grant to such corporation, upon such terms as it deems proper, the right to use the streets and bridges within the limits of the municipality for laying tracks and running cars thereon. The statute then provides:

"Every such road shall be constructed upon the most approved plan *and be subject to such reasonable rules and regu-*

lations and the payment of such license fees as the proper municipal authorities may by ordinance, *from time to time,* prescribe."

This statute is as broad and comprehensive as language can well make it. The ordinance in controversy here is unquestionably a regulation. The language quoted precludes the idea that the "regulations" referred to must be passed when the right to use the streets is granted, because they may be passed "from time to time." There is no apparent reason for saying that some particular kind of regulations were intended to be covered and that others were intended to be excluded. The only limitation or restriction which the law fixes is that the "regulations" must be *reasonable.* It is not seriously contended that it is beyond the power of the law-making body to require a street railway company to sprinkle the streets immediately adjacent to its tracks. The reasonableness of this particular regulation is attacked on two grounds, which will be considered later. Being satisfied that sec. 1862, Stats. (1898), conferred on the city the power to pass the ordinance, assuming it to be reasonable, it is unnecessary to consider the other acts urged by the city in support of its right to legislate as it did. We apprehend that if the ordinance is not a reasonable regulation it cannot be justified on any ground. Ordinances requiring street railway companies to sprinkle the streets immediately adjacent to their tracks have been held valid by a number of courts. *City & S. R. Co. v. Savannah,* 77 Ga. 731; *State v. C. & C. R. Co.* 50 La. Ann. 1189, 24 South. 265; *Newcomb v. Norfolk W. St. R. Co.* 179 Mass. 449, 61 N. E. 42; *Chicago v. Chicago U. T. Co.* 199 Ill. 259, 65 N. E. 243. No decisions to the contrary have been cited and we have found none. Only in a case which is clear beyond a reasonable doubt will the courts declare laws void which are adopted under the police power in the interest of the public health. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *Bonnett v. Vallier,*

136 Wis. 193, 116 N. W. 885; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Benz v. Kremer,* 142 Wis. 1, 125 N. W. 99. The validity of a city ordinance is tested by the same rule. *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 481, 115 N. W. 376, 1136, 1139; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036; *C. Beck Co. v. Milwaukee,* 139 Wis. 340, 120 N. W. 293. We entertain no doubt that the power existed to pass an ordinance of the general character of the one adopted, provided such power was exercised in a proper manner. The reasons which support and sustain the imposition of such a burden will be discussed under an assignment of error which raises the alleged discriminatory features of the ordinance.

7. Is the ordinance void because of unreasonableness? It is urged that, assuming the city had power to pass some kind of an ordinance requiring the appellant to sprinkle a portion of the public streets, such power was exercised in an unlawful manner, in that the rules adopted by the board of public works aim at an ideal rather than a practical result, and that such result can only be attained by the expenditure of an extravagant sum of money which it is not reasonable to require the appellant to expend. The obnoxious requirement is found in rule 3, which imposes on the appellant the duty of sprinkling the streets in such a manner as will keep the surface continually moist and prevent the dust from arising at all times each day when the work is done, "but not in such a manner as to create mud or pools of water." It is argued, and reasonably enough, that it may be well nigh impossible to so sprinkle streets that no dust will arise therefrom, and that it is impossible to sprinkle them in the usual and customary way and at the same time keep them entirely free from mud or even pools of water. But the rules must have a reasonable interpretation, and if they are susceptible of one that will make the ordinance valid it is to be preferred to one which will render it void. It is a matter of common knowl-

edge that streets frequently have depressions in them and that water will run down hill and will collect in these depressions and form little pools, until it seeps into the ground or evaporates. But we think it was not intended that the street railway company should guard against a thing of this kind, but rather to prevent such large quantities of water from being poured onto the streets at any one time as to create continuous pools of water therein. So, too, we all know that dust will accumulate on the streets and that when it becomes sufficiently thick it will turn to mud when saturated with water. But here again it is very evident that what the rules were intended to guard against was the excessive use of water at any one time or the creation of a permanent condition. This would seem apparent from rule 4, which provides that paved streets shall be sprinkled lightly, but "graveled or macadamized streets shall be thoroughly wetted down." The board of public works did not mean that certain streets should be thoroughly wetted down and at the same time that the laws of nature should be defied in so doing. The rules must be read and construed together and be given a reasonable interpretation; and so interpreted they mean that the appellant must exercise ordinary care and caution in doing the work of sprinkling.

8. It is next claimed that the ordinance is void because it is discriminatory. It is said that some streets are used by steam roads and that automobiles and teams are constantly using most of them, and that no good reason exists for singling out one user from the many and compelling it to bear an expense not imposed on other users, and that appellant is therefore being denied the equal protection of the laws.

The question involved is really one of classification. The essentials requisite to constitute legitimate classification have been laid down in a number of cases recently decided and it is unnecessary to reiterate them. They will be found in *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309,

120 N. W. 756; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277; *State v. Evans,* 130 Wis. 381, 110 N. W. 241; and *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561. In the matter of stirring up dust and setting it in motion, street-car lines easily fall into a class by themselves. Their cars are large and heavy and run at a high rate of speed and with great frequency. The bodies of such cars rest close to the surface of the street. They occupy a very considerable of the best portion of the streets to the exclusion of the general public a large part of the time. They run on tracks which create peculiar conditions for the accumulation of dust and dirt, and they occupy the streets by permission from the common council and not as a matter of absolute right. And finally, they are subjected by statute (sec. 1862, Stats. 1898) to reasonable rules and regulations. No other agency stands on the same footing with the street cars in the matter of raising dust. The steam roads occupy a small portion of a few unimportant streets in the outlying districts and cross over some others at grade, but their occupancy of the streets is almost negligible as compared with the street railway system. Of course many different kinds of vehicles occupy the streets and all stir up more or less dust when the necessary conditions exist, but it does not follow that because all are not called upon to contribute all must escape. This would entirely exclude the idea of classification. The purpose of this law is to provide for the sprinkling of a well defined portion of the public streets of the city. The appellant has, under the franchise granted to it, a paramount right to use and occupy this particular part of the street. In so doing it is largely responsible for setting in motion the dust that arises therefrom, and falls within a class by itself under the authorities cited.

9. Was the ordinance legally enacted? The city charter, sec. 2, ch. 4, provided that "on all questions, ordinances or resolutions for assessing and levying taxes, or for the appropriation or disbursement of money, or creating any liabilities

or charge against said city or any fund thereof, the vote shall be taken by ayes and noes; and every vote by ayes and noes shall be entered at length upon the journal." Sec. 4 of ch. 4 of the charter contains a provision substantially like that quoted. The roll call showed forty-two members of the common council present at the meeting at which the ordinance was passed. An "aye" and "no" vote was taken on the adoption of the ordinance. Forty-one members voted aye and none voted no. The clerk preserved the original minutes showing the names of the aldermen who voted on the ordinance and how they voted. The entry made on the journal, however, was to the effect that forty-one votes were cast in favor of the passage of the ordinance and none in opposition, without stating the names of those voting. Thus it became impossible to tell from the journal what members voted on the passage of the ordinance.

Sec. 5 of ch. 4 of the charter provided that all proposed ordinances should be referred to appropriate committees before their passage, and that if any report was made on any ordinance appropriating money out of or creating any charge against any fund, such report should be countersigned by the city comptroller, and that the report should not be countersigned unless there was a sufficient amount of money in the fund to meet the appropriation.

The ordinance in dispute provided that the city should furnish, free of charge to the street railway companies, the necessary water for sprinkling, and that the water so furnished should be chargeable to and payable out of the general fund of the city. The street railway companies were required to furnish to the board of public works on the 5th of each month a statement of the amount of water used during the preceding month.

The contention of the appellant is that the ordinance created a charge or liability against the city or some fund thereof, and that, the "aye" and "no" vote not having been

entered at length upon the journal, it was never legally passed.

Laws requiring the "aye" and "no" vote to be taken on certain questions and entered upon the permanent record of the common council of a city are generally held to be mandatory, and the requirement that the record be kept stands on no different footing from that relating to the manner of voting. *Steckert v. East Saginaw,* 22 Mich. 104; *Pickton v. Fargo,* 10 N. Dak. 469, 88 N. W. 90; *Cook v. Independence,* 133 Iowa, 582, 110 N. W. 1029; *Payne v. Ryan,* 79 Neb. 414, 112 N. W. 599; *Rich v. Chicago,* 59 Ill. 286; *Logansport v. Crockett,* 64 Ind. 319, 324; *Cutler v. Russellville,* 40 Ark. 105; *Sullivan v. Leadville,* 11 Colo. 483, 18 Pac. 736; 1 Dillon, Mun. Corp. (4th ed.) § 291. The reason for such enactments is that the people generally, and particularly the constituency of an alderman, are entitled to know how their representatives vote on important questions. In order that they may know, it is quite as important that the record of the vote be preserved as it is that it be taken in such a manner that it can be preserved. While it is possible in the present case to ascertain from the original minutes of the meeting who voted for the passage of this ordinance, it is not possible to do so from the journal, and this is the record which the law requires shall be complete. The only cases we have found which hold that a provision requiring the "aye" and "no" vote to be taken is directory are *Striker v. Kelly,* 7 Hill, 9, 29 (affirmed 2 Denio, 323), and *Elmendorf v. New York,* 25 Wend. 693. The reason which impelled the great majority of courts that have passed upon the question to hold such acts mandatory is quite convincing, and such a rule is apt to produce the best results in the administration of municipal affairs, and we adopt it without hesitancy.

It remains to be considered whether the ordinance created a debt or liability against the city or a charge on any fund thereof. Unless it did it was unnecessary that the "aye" and

"no" vote be taken or preserved. This presents one of the most serious questions in the case. If it is important that the "aye" and "no" vote shall be taken and preserved in the manner the charter requires, it is just as important that it be taken on all questions falling within the charter provisions. The provisions, it is true, are broad and general, but liberality in construction should not lean in the direction of unduly restricting the application of the statute. That the ordinance does not create a "debt or a charge against any fund" is clear enough, but that it does not create a "liability" is not so clear. If the term is used in its broadest and most comprehensive sense it would include any obligation which a party was bound in law or justice to perform and is synonymous with responsibility. In its more restricted and perhaps in its popular sense it means that which one is under obligation to pay to another.

The city owns its own water-works. The object and purpose of the ordinance is not to appropriate money or create any indebtedness, but to require the appellant to sprinkle a portion of the streets which it uses. Incidentally it is provided that no charge shall be made for the water used in sprinkling and which the city must pump into its mains. The city may refuse or decline to permit the appellant to draw water from its hydrants, but if it does the ordinance automatically becomes inoperative. No money is voted out of the city treasury by the ordinance and no expense is contemplated, except it be the fuel consumption in pumping the extra water, and the wear and tear on the pumps in doing the extra work. It is not even certain that these items of expense are real. We are not advised as to whether or not the streets were sprinkled before this ordinance was passed, but the fair presumption is that they were; else there would be little warrant for sprinkling a strip in the center of the streets and neglecting the rest of them. If they were, we must also presume that the city was furnishing water for such sprinkling and

was receiving no compensation therefor, unless we assume that the appellant was made a special object of bounty. The resolution of July 6, 1909, provided that the city should furnish water free of charge, which would indicate in some measure what its practice was. We mention these matters as indicating that there is no affirmative showing that the expense of the city would be at all increased by the passage of this ordinance. Indeed it may well be that it was relieved of a portion of the cost of sprinkling street crossings at least. We think the word "liability" as used in the charter means something other than a mere naked undertaking which may involve no expense to the city at all, and that it was intended to cover some claim or obligation which in the ordinary course of business should be presented to the council for audit and allowance, and which should upon allowance constitute a charge on some fund. Until the amount of expense, if any, incurred under this ordinance was either ascertained or estimated, there was no charge against any fund, and the expense could be ascertained and provided for after the ordinance was passed as well as at the time of its passage. We conclude that the judgment is right and should be affirmed.

By the Court.—Judgment affirmed.

RUCK, by guardian *ad litem*, Appellant, vs. MILWAUKEE BREWERY COMPANY, Respondent.

December 6, 1910—January 10, 1911.

Master and servant: Latent dangers: Duty to give warning: Assumption of risk: Questions for jury: Evidence: Weight: Competency: Form of objection: Expert testimony: Cross-examination.

1. If the master knows or by the exercise of ordinary care ought to know of latent dangers attendant upon the usual conduct of his business, and the servant does not and cannot by the exercise of ordinary care know thereof, it is the master's duty to warn the servant, and if he fails to do so the servant does not assume the risk by remaining in the employment.

2. In an action for an injury caused by the explosion of a bottle of beer while standing on a tray after having been immersed in hot water in the process of pasteurizing, the evidence being conflicting, the questions whether bottles had previously exploded under similar circumstances, and whether defendant knew or in the exercise of ordinary care ought to have known thereof, were for the jury.
3. Although plaintiff had been employed for several weeks in the same room, as sweeper and general helper, but never before in assisting to fill the tray, his testimony that he did not know that bottles exploded either when handled or when standing still, was not so incredible that no weight should be attached thereto.
4. An admonition to plaintiff by the foreman to be careful and not let the bottles strike together was not a sufficient warning of the danger incident to the explosion of bottles.
5. A question asked of another servant as to whether the foreman knew, before plaintiff was injured, that the witness had been injured by a similar explosion, was competent.
6. An objection to a question as incompetent does not reach the fault that the question assumes the existence of a fact not proven.
7. An expert witness having testified as to the degree of pressure to which bottles were subjected in the pasteurizing process, it was competent on cross-examination to call his attention to an article in a brewing journal, containing a different opinion on the subject, and ask him whether or not he had approved of such article.
8. A witness having testified to seeing bottles explode and pieces of glass fly in all directions, it was competent to ask him whether or not they flew with such force as to inflict injury if they came in contact with the skin or body, any ordinary witness being competent to draw such a direct inference from what he has observed and to testify concerning it.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action for personal injuries. Plaintiff at the time of his injury, July 3, 1907, was a young man sixteen years of age and of average intelligence. Defendant was the owner of a brewery, wherein it manufactured and bottled beer. Pre-

vious to the sale thereof the beer was put through a sterilizing process which consisted in placing about 1,800 filled and corked bottled in layers separated by iron sheets in a vat or tank into which cold water was let. Later, steam was injected and the temperature of the water in the vat raised to about 140 degrees Fahrenheit. The bottles were kept in this temperature for about thirty minutes, when cold water was turned into the vat from below, and the hot water was floated off on top through openings, and the temperature reduced to about 88 degrees. The heating of the beer in the bottles caused it to expand, and the carbonic acid gas in the beer was liberated, thus subjecting the bottles to considerable pressure. Beside the vats or tanks were movable trays that rolled down on rails to what was called the labeling machine. When the bottles had been in the vat or tank the required time they were removed therefrom by hand and placed on these trays.

Plaintiff was employed by the defendant in June, 1907, did sundry work about the factory, but principally acted as a helper to men who distributed and delivered defendant's beer. On the day of the injury he was assisting one Frank Kroll, and his work consisted in moving the bottles further to the side of the tray, thus making more room on the tray near Kroll for placing bottles thereon taken by the latter from the tank. When he had worked about four or five minutes a bottle exploded and the pieces of flying glass struck him in the face and destroyed his right eye.

At the close of the evidence, on defendant's motion the court directed a verdict in its favor, and from a judgment entered thereon the plaintiff appealed.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. D. Corrigan.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

VINJE, J. The complaint, among other charges of negligence against the defendant, contains an allegation that bot-

tles, while being taken from the pasteurizing vat and while standing still on the tray after being taken therefrom, would occasionally explode; that defendant knew, or in the exercise of ordinary care ought to have known, of such explosions; that the plaintiff did not know, and could not in the exercise of ordinary care have known, thereof; and that it was the duty of the defendant to warn him of such danger incident to his employment.

Plaintiff testified that the bottle that exploded and injured him had been standing still on the tray a minute or two before the explosion occurred. There is ample evidence on the part of the plaintiff to show that bottles, whether in the tank, standing on the tray, or while being handled, occasionally exploded. Some of the evidence shows that such explosions were quite frequent and that defendant had knowledge thereof. The evidence on behalf of the defendant is that bottles would occasionally explode when being handled roughly or struck together, but that no explosions ever took place after they were taken from the pasteurizing vat and were standing still on the tray. Under such conflicting evidence it was for the jury to say whether or not bottles occasionally exploded while standing still, and whether or not the defendant knew, or in the exercise of ordinary care ought to have known, of such explosions.

It is contended on the part of the defendant that if explosions took place the plaintiff must have known of them, because he had been working in the room several weeks when the explosion that caused his injury occurred. Plaintiff's testimony, however, is that he had been employed as a sweeper and general helper and that he had never been employed to do the work he did at the time he was injured, and further, that he did not know that bottles exploded either when handled or standing still. Counsel for defendant claims that this testimony is so incredible that no weight should be attached thereto. We cannot concur in this view. It was for the jury, under all the evidence, to determine whether the plaintiff knew, or

in the exercise of ordinary care ought to have known, that bottles occasionally exploded.

The plaintiff admitted that the foreman had told him to be careful with the bottles—to be careful not to let the bottles strike together, and it is claimed by the defendant that such admonitions were a sufficient warning to the plaintiff of the danger incident to the explosion of bottles whether standing still or while being handled. We fail to see the force of this claim, for it is evident that the warnings given fall far short of advising plaintiff that if he was not careful with the bottles, or that if he struck them together, they might explode and hurt him. They also fall far short of informing him that bottles were liable to explode while standing still. He might properly think that such caution was given merely for the purpose of avoiding breakage of bottles and consequent loss of property. True, he was old enough to be chargeable with knowledge that if he struck bottles together they might break and that he might get hurt as a result of such breaking. The risk incident to such an injury he assumed. It was obvious to a person of his age and experience. But it cannot be said as a matter of law that he was chargeable with knowledge that if bottles were carelessly handled they were liable to explode and hurt him or that they might do so while standing still.

It seems that the trial court based its direction of a verdict in favor of the defendant solely upon the ground that there was nothing unusual about the conduct of defendant's business and, therefore, no negligence was shown. This overlooks the fact that there always may be latent dangers attendant upon the usual conduct of a business of whose existence it is the duty of the master to warn the servant so that the latter can decide for himself, after being so warned, whether or not he will assume them by remaining in the employment. If the master knows, or in the exercise of ordinary care ought to know, of such latent dangers, and the

servant does not, and in the exercise of ordinary care cannot, know thereof, then a failure to warn constitutes negligence on the part of the master. So, if it be a fact in this case that there was a latent danger incident to plaintiff's employment, and he did not know, and could not by the exercise of ordinary care have known, thereof, and that the defendant did know, or by the exercise of ordinary care ought to have known, of it, and failed to warn him, then such failure to warn was negligence on the part of the defendant, and the plaintiff, by remaining in the employment, did not assume the risk incident to such latent danger.

The court should have submitted to the jury, in appropriate form, these questions: (1) Was there a latent danger from explosions of bottles incident to plaintiff's employment? (2) Did the defendant know, or ought he in the exercise of ordinary care to have known, of such danger? (3) Did the plaintiff know, or ought he in the exercise of ordinary care to have known, of such danger? together with such additional questions as the issues made by the pleadings and evidence required.

Several errors are assigned upon evidence offered by the plaintiff and ruled out by the court. These will now be considered. A witness who had testified that bottles standing on the tray exploded occasionally, and that the foreman knew of such explosions, was asked this question by plaintiff's counsel: "Did the foreman know before *John* [the plaintiff] got hurt that you had been hurt by the explosion of a bottle while it was resting on the steel tray after it had been removed from the steam tank and before it had received any force from the outside?" This was objected to as incompetent and the objection sustained. The fact as to whether or not bottles standing on the tray were liable to explode or did explode was in issue, likewise the fact as to whether or not, if bottles so standing exploded, the defendant knew thereof. The latter question was directed to the issue of defendant's

knowledge and was certainly competent upon that subject. No doubt the question was objectionable on the ground that it assumed the existence of a fact not proven, namely, that the witness had been hurt. But the objection that the evidence was incompetent did not reach that vice in the question, and it was error to sustain such objection.

The witness Kremer was called as an expert by the defendant. He testified upon direct examination as to the degree of pressure bottles were subjected to in this pasteurizing process. Upon examination his attention was called to an article that had appeared in a certain quarterly journal devoted to brewing, claimed by counsel for plaintiff to have contained an opinion different from that testified to by the witness as to the degree of pressure bottles were subjected to in such process, and he was asked whether or not he had approved of that article. This was objected to on the ground that the testimony was incompetent and the objection sustained. A number of questions similar to the one stated were propounded to the witness, some of which were objected to by counsel for defendant and sustained by the court, and one the court ruled out of its own motion. Such rulings were erroneous, for the plaintiff was entitled, if he could, to obtain an admission from the witness that he had formerly made statements or approved of opinions contrary to those testified to by him on the trial.

Another witness, after having testified that bottles exploded and pieces of glass flew in all directions, was asked this question: "Do you know whether or not they flew with such force that it would inflict injury upon the skin or the body when it would come in contact with the body?" The question was objected to as being incompetent and the court sustained it, on the ground that the question called for the conclusion of the witness rather than for a fact as to whether or not bottles exploded in such a manner as to cut someone. It is apparent that the question simply called for the knowledge or lack of

knowledge of the witness on the subject, and was therefore merely a preliminary question that did not inquire into what the fact actually was. But both the court and counsel seem to have treated the question as one directed to the fact as to whether or not bottles so exploded, and it is evident that if the witness had had any experience on the subject or had actually observed such effect on others, the answer would not be the conclusion of the witness but would be evidence as to a fact either experienced or witnessed; and even if the witness had observed only explosions that injured no one, his answer would not be in the nature of expert testimony. He would be competent to give an opinion as to whether or not the explosions witnessed by him had sufficient force to inflict such injury as was described in the question. Any ordinary witness is competent to draw such a direct inference from what he has observed and testify concerning it. The fact as to whether or not explosions were sufficiently strong to be likely to cause injury to any one was material upon the issue of the existence of a hidden danger, and the evidence was therefore improperly excluded.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

INDIANA ROAD MACHINE COMPANY, Appellant, vs. MURPHY, Respondent.

December 6, 1910—January 10, 1911.

Sales: Statute of frauds: Delivery: Pleading: Evidence.

In an action for the purchase price of goods, where the contract of sale was oral and the price more than $50, no part of which was paid, so that under sec. 2308, Stats. (1898), there must have been actual delivery and acceptance to constitute a valid sale, evidence tending to show that there was no such delivery or acceptance is admissible under an answer merely denying the sale.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *F. A. Teall.*

D. J. Dalton, for the respondent.

WINSLOW, C. J. This is an action to recover $700, the purchase price of a patent grading machine alleged to have been sold and delivered by the plaintiff to the defendant. The answer denied the sale.

The defendant's evidence, admitted over objection, tended to show that the arrangement was that the plaintiff might ship the grader to defendant at Milwaukee, and that if the machine was properly set up and did satisfactory work he would take and pay for it; that it was shipped and received at Milwaukee, but never set up by the plaintiff for operation nor accepted by the defendant. The jury found by their verdict that there was no sale and no delivery, and judgment was rendered for the defendant.

The appellant's contention is that the evidence above referred to was not admissible under an answer which merely denied the sale, but could only be received under an answer specifically setting forth the arrangement which was made.

We think the objection is overnice. The arrangement was oral and no part of the purchase money was paid. The price being more than $50, there must have been actual delivery and acceptance of the article before there could be a valid sale. Sec. 2308, Stats. (1898). The evidence referred to tended to show that there never was any delivery or acceptance of the property which was to be delivered, namely, a grader set up and ready for use. If this was the fact there was no sale, hence there was no error in admitting the evidence under an answer simply denying the sale. No other points require attention.

By the Court.—Judgment affirmed.

LIPPERT, Respondent, vs. GARRICK THEATRE COMPANY, Appellant.

December 7, 1910—January 10, 1911.

Sunday: Contracts.

A contract, made on a secular day, providing that plaintiff should enter defendant's employ on a subsequent secular day, was not void under sec. 4595, Stats. (1898), merely because plaintiff's salary was to commence on the first day of the next month, which was Sunday, where there was no provision that any work should be done on that day and both parties performed the agreement for a long time thereafter.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment awarding the plaintiff $735.16 on account of alleged breach of contract on the part of the defendant by discharging the plaintiff before the term of services under a contract had expired. The contract was made on the 31st day of July, 1907, and provided in effect that the defendant employed the plaintiff as its buffet and bar manager for the season commencing September 1, 1907, for a period of forty weeks at a salary of $100 per month, and allowed him the use of the floor bar during the period that the defendant's theater was closed, without cost for rent; that the plaintiff was to enter the employ of the defendant August 26, 1907, and receive no pay until September 1, 1907; and further provided that the duty of the plaintiff should be to supervise all bars, and he was to receive his pay weekly. The agreement was conditioned that plaintiff's work should be reasonably satisfactory.

The complaint sets up this contract and that plaintiff entered the employ of the defendant under it on the 26th day of August, 1907, on the terms and conditions of the contract, and duly performed his duties thereunder until the 30th day of November, 1907, at which time the defendant discharged

him without cause and for the purpose of defrauding him out of the benefits and profits of said contract, and has since refused to be bound by said contract, and refused to permit plaintiff to continue in said employment, and has denied him the use of the floor bar or other privileges under the contract, all of which were very valuable, by reason of which plaintiff sustained $2,000 damages.

The answer admits the contract as alleged, and that on the 26th day of August, 1907, plaintiff entered upon the performance of his duties under such contract, and continued until November 30, 1907, and alleges that he was at that time justly discharged by defendant on account of gross incompetency and insubordinateness. The jury returned the following verdict:

"(1) Did the defendant, *Garrick Theatre Company,* acting in good faith, adopt a resolution on the 13th day of November, 1907, discharging the plaintiff on the 30th of November because his work as 'supervisor of all bars' in the Gayety Theatre was not 'reasonably satisfactory to the management' thereof? *A.* No.

"(2) Was the defendant justified in discharging the plaintiff because his work was not 'reasonably satisfactory to the management' of the defendant company as 'supervisor of all the bars' in the Gayety Theatre? *A.* No.

"(3) If you answer the foregoing questions 'Yes,' you need not answer this question; otherwise answer this question: What was the reasonable value of the use of the floor bar in the Gayety Theatre from June 6, 1907, to August 20, 1907? *A.* $187.

"(4) If you answer questions 1 and 2 'Yes,' you need not answer this question; otherwise answer this question: At what sum do you assess the plaintiff's damages? *A.* For the value of the use of the bar, $187; for the value of services, $573."

Motions were made by defendant for judgment notwithstanding the verdict, to change the answers in the verdict, to set the verdict aside and grant a new trial, all of which were

denied, and judgment rendered for the plaintiff on the verdict, from which this appeal was taken.

For the appellant there were briefs by *Fred A. Landeck* and *Robert R. Freeman,* and oral argument by *Mr. Landeck.*

W. B. Rubin and *W. C. Zabel,* for the respondent.

KERWIN, J. There is no bill of exceptions in this case, and the only question here for review is whether the pleadings support the judgment. This involves consideration of the contract set up in the complaint as the basis of the plaintiff's cause of action. It is insisted by appellant that this contract is void under sec. 4595, Stats. (1898), which prohibits certain labor, business, or work on the first day of the week, commonly called Sunday. The contract was executed on July 31, 1907, and provided that the term of service should commence on the 26th day of August, 1907, and that the salary commence on September 1, 1907, and continue for a period of forty weeks, payable weekly. The plaintiff entered upon the performance of the contract August 26th and continued to work under it until November 30, 1907, and was paid for all services up to that date. Neither the 31st of July nor the 26th of August, 1907, was Sunday, but September 1st was, and it is insisted that because the salary, by the terms of the contract, was to commence on Sunday the contract was void. There are several reasons why this contention cannot be sustained. In the first place the contract does not provide that any services shall be performed on September 1st. It provides that the salary shall be paid weekly and shall commence September 1st. A construction cannot be placed upon a contract which will render it void and unlawful when capable of one which will render it lawful and valid. Moreover, this court has held that although some acts be done under a contract on Sunday it is not void if it be carried out on a secular day. *King v. Graef,* 136 Wis. 548, 117 N. W. 1058. And even a Sunday contract may by a subsequent

promise to carry it out, or by acts done in performance of it, be validated. *Melchoir v. McCarty,* 31 Wis. 252; *Williams v. Lane,* 87 Wis. 152, 58 N. W. 77; *Hopkins v. Stefan,* 77 Wis. 45, 45 N. W. 676; *Schmidt v. Thomas,* 75 Wis. 529, 44 N. W. 771; *Sentinel Co. v. A. D. Meiselbach M. W. Co., ante,* p. 224, 128 N. W. 861. There is no question here of claim for services performed on Sunday. The contract was made on a secular day and performed by both parties until long after September 1st, namely, November 30th. There is no doubt, under the decisions of this court and the facts established by the pleadings, but that the contract was valid, and therefore the judgment below cannot be disturbed.

By the Court.—The judgment of the court below is affirmed.

UECKE, Appellant, vs. HELD and wife, imp., Respondents.

December 7, 1910—January 10, 1911.

Pleading: Misjoinder of causes of action: Vendor's lien on land.

Where a complaint states no more than the facts necessary to show plaintiff's right to declare and enforce a vendor's lien on land, and shows that it was the pleader's intention to state that cause of action, it should not be held that a cause of action at law has been joined therewith merely because the prayer for relief is that plaintiff have judgment for the unpaid purchase price and, in case it be not paid by a day to be named by the court, that it be adjudged and enforced as an equitable lien on the land.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

June 1, 1906, Wilhelm Uecke and his wife *Caroline,* the plaintiff herein, sold to the defendant Jacob Held certain real estate which they owned jointly. Four hundred dollars of the purchase price of $1,100 was paid in cash and the purchaser gave them a promissory note due in one year for the balance. By direction of the purchaser, Jacob Held, the

deed was made to his son, the defendant *George L. Held.* Payment of the note for $700 was extended for a year. Upon its becoming due payment was refused. The complaint alleges that the son holds the real estate in trust for the father; that the defendant *Annie Held* is the wife of *George L. Held;* that the vendor, Wilhelm Uecke, has died intestate; that prior to his death he assigned his interest in the note to the plaintiff, and that she holds the note by virtue of this assignment and by right of survivorship; that the defendant *George L. Held* took the conveyance of the property with full knowledge that $700 of the purchase price of the property was unpaid and evidenced by this note; and that no action or proceeding has been taken to collect said note or purchase money.

It is alleged that the defendants Fred Pflughoef and his wife Martha have a land contract executed in their favor by the defendant *George L. Held* on which there is still due about the sum of $900.

"Wherefore, the plaintiff demands judgment against the defendant Jacob Held for the sum of seven hundred ($700) dollars, with interest thereon and costs of suit, and in case the said defendants fail to pay said judgment by a day to be named by the court, that said purchase money so unpaid and interest be adjudged and allowed as a lien on the aforesaid real estate, and that plaintiff be adjudged to have an equitable lien upon said lands for the unpaid purchase price thereof, aforesaid, and that the said defendants and all persons claiming under them since the commencement of this action be barred and foreclosed of all right, title, interest, lien or equity of redemption in said lands, and that the same be sold under the direction of this court, and at such time and in such manner as the court may direct, and the plaintiff be paid the amount of said lien out of the proceeds of such sale, together with the expenses of such sale and the costs of this action, and that in case of deficiency the plaintiff have judgment against the defendant Jacob Held for the amount thereof, and for such other or further relief as may be just and equitable."

The court sustained a demurrer of the defendants *George L. Held* and *Annie Held* on the ground of the improper joinder of causes of action and because the complaint did not state facts sufficient to constitute a cause of action against the defendants. This is an appeal from the order of the court sustaining the demurrer.

The cause was submitted for the appellant on the briefs of *Lenicheck, Robinson, Fairchild & Boesel,* and for the respondents on the brief of *E. J. Ludwig.*

SIEBECKER, J. The plaintiff claims that the court erred in sustaining the demurrer because the complaint alleges sufficient facts to constitute a cause of action for relief by way of declaring and enforcing a vendor's lien, and because no other cause of action is alleged. The trial court held that the averments constituted a cause of action at law in addition to such an action in equity. The facts alleged are material and pertinent to a statement of a cause of action to declare and enforce a vendor's lien and must be so viewed. It is clear from the allegations of the complaint that the pleader's object was to state the facts for relief so as to establish and enforce a vendor's lien. The trial court evidently viewed the facts alleged as stating a cause of action on the note, because the plaintiff asks that judgment be awarded for the unpaid purchase price against Jacob Held, the maker of the note. The complaint, however, states no more than the material facts showing the primary right of a vendor to declare and enforce a vendor's lien. It is essential to such a cause of action that the court ascertain the amount of the purchase price remaining unpaid and award judgment against the debtor therefor. And the demand for judgment against the debtor for such amount does not give the complaint a double aspect of stating two causes of action, for a recovery at law on the note and to enforce a vendor's lien. If the complaint be tested in the light of the subject of controversy presented, it is plain that but

one primary right is sought to be enforced. The allegations are clearly sufficient to constitute a cause of action to enforce plaintiff's right to a vendor's lien, and, when so interpreted, all the facts alleged and the relief prayed harmonize with such a purpose and object.

The question of fact as to whether or not the taking of the note from the vendee was accepted as payment of the balance of the purchase money is sufficiently negatived by the allegations of the complaint, which refute respondents' claim that the facts alleged show that it was accepted in payment of the balance of the purchase price.

We consider that the complaint states a good cause of action to declare and enforce a vendor's lien and that there is no misjoinder of causes of action.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with directions to enter an order overruling the demurrer and granting the defendants the privilege of answering upon the usual terms and conditions.

GROSS, Appellant, vs. SALSICH, Respondent.

December 7, 1910—January 10, 1911.

Contracts: Construction: Exchange of lands: Performance and tender: Remedies.

1. Pursuant to a previous written contract, the parties exchanged lands as therein agreed, with the exception of one lot the title to which was in litigation, and defendant agreed in writing to pay plaintiff $500 if he should be unable to give title to that lot by a certain date. *Held*, that the two contracts should be construed together, the original contract remaining in force and binding plaintiff to carry out any stipulations on his part which remained unperformed, and defendant's new promise being in the nature of security for performance on his part.
2. Within the time limited defendant perfected his title to the unconveyed lot and tendered a proper conveyance to plaintiff

upon condition that the latter pay over a certain excess of rents which he had in the meantime collected and which defendant was entitled to under the original contract. *Held*, that such condition was reasonable and proper and the tender sufficient under the contract.

[3. Whether, if defendant being able had absolutely refused to convey under any circumstances, plaintiff could maintain an action to recover the $500, or whether his remedy would be for specific performance, not decided.]

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from a judgment dismissing the plaintiff's complaint and rendering judgment in favor of the defendant on his counterclaim for $75, together with costs. The complaint is based upon an agreement dated June 22, 1905, under which, it is alleged, it was agreed that if defendant should not be able to give plaintiff a good and merchantable deed for lot 18, in block 2, Hillcrest, East Milwaukee, county of Milwaukee, Wisconsin, on or before December 21, 1905, then and in that event defendant agreed to pay plaintiff $500; that defendant was unable to execute and did not execute said conveyance and did not offer or tender the same to the plaintiff; that the sum of $500 has been due and unpaid from defendant to plaintiff since December 21, 1905, for which sum plaintiff demands judgment with interest from said 21st day of December, 1905.

The defendant's answer sets up an earlier agreement dated June 3, 1905, between plaintiff and his father as parties of the first part and defendant as party of the second part, under which agreement plaintiff and his father were to convey certain real estate to defendant subject to mortgages, and defendant was to convey to plaintiff certain real estate in exchange and pay plaintiff $5,000, excess in value of the real estate of the plaintiff over that of the defendant; that the exchange of the properties and payment of the money was to

be made June 30, 1905; that the agreement of June 3, 1905, provided, among other things, that each of the parties should be entitled to the possession and to the receipt of the rents and profits of the premises agreed to be conveyed from the 1st day of July, 1905, and that the parties of the first part should pay and assume the interest and mortgages on the property described up to the 1st day of July, 1905; that the exchange of properties, except lot 18, and the payment of the $5,000, was made before June 30, 1905, namely, on June 22, 1905; that the plaintiff and his father breached the agreement of June 3, 1905, and collected and converted to their own use, without the consent of the defendant, rents belonging to defendant, and took possession of the property and assumed ownership and control thereof, failed to pay water taxes as agreed, and did other acts respecting said property contrary to the agreement, to defendant's damage. Defendant also alleged that he had title to lot 18 and was ready, willing, and able to convey it to plaintiff as soon as plaintiff carried out his agreement and reimbursed defendant for rents and other moneys due defendant under the contract. The answer also sets up a counterclaim demanding $99.34.

The principal facts were stipulated and the case submitted to the court upon such stipulation of facts, the testimony of the plaintiff taken, and upon the facts admitted in the pleadings. The court made the following findings of fact and conclusions of law:

"*First.* That on June 3, 1905, the plaintiff and his father, Bernard Gross, as parties of the first part, and the defendant as party of the second part, made and entered into the written agreement set forth in the defendant's answer herein.

"*Second.* That pursuant to said agreement the parties interested, on June 22, 1905, instead of June 30, 1905, the time stipulated in said agreement, made an exchange by way of mutual conveyance of the respective properties set forth in said agreement, plaintiff alone conveying to defendant and defendant conveying to plaintiff alone by mutual consent, and

on said day paid the sum of money agreed to be paid therein and accounted for rents collected, etc., prior to June 22, 1905, up to July 1, 1905, with the exception of lot 18, block 2, in Hillcrest, which was not at that time conveyed because said lot was then in litigation. Said lot was vacant and unproductive and valued at $500 June 3 and 22, 1905.

"*Third.* That on June 22d aforesaid, the time for the conveyance of said lot 18, block 2, Hillcrest, was extended by written agreement in the words following:

"'June 22, 1905.

"'*Mr. Harry F. Gross,* Milwaukee.

"'DEAR SIR: I am unable to give you a good and merchantable deed for lot number 18, in block 2, Hillcrest, East Milwaukee, on account of the litigation concerning the same now pending in court.

"'I would therefore request you to give me six months' time from date to give you the deed, and hereby agree that in case I should not be able to give you then the deed I shall pay you the sum of five hundred dollars ($500) on the 21st day of December, 1905. I also wish to state that as I am in a hurry to leave town and cannot wait for the perfection of the abstract of title, I hereby agree to pay all expenses necessary to perfect the title of all the other lots in Hillcrest which I have deeded to you this day.'

"Which was signed by plaintiff and accepted by said defendant. No other agreements being made except as aforesaid.

"*Fourth.* That after June 22, 1905, aforesaid, plaintiff collected through his father as his agent, in excess of what was due him as appeared upon an accounting had at the trial, the sum of $75, which belonged to the defendant under said agreement of June 3, 1905, and that plaintiff neglected and refused to account for and pay over to said defendant said sum as demanded, prior to said trial.

"*Fifth.* That on September 22, 1905, the litigation concerning said lot 18, block 2, Hillcrest, was terminated, and said defendant by warranty deed dated September 25, 1905, from Thomas H. Brown and wife to him, became the owner of and acquired merchantable title to said lot 18, and after September 25, 1905, was able to give plaintiff a deed to said lot conveying merchantable title thereto, as agreed by contract aforesaid, and in full compliance therewith.

"*Sixth.* That on December 28, 1905, said defendant and his wife duly executed a warranty deed to said plaintiff, conveying said lot 18, in block 2, Hillcrest, aforesaid, and on that day notified said plaintiff in writing that the deed for said lot was ready for delivery to plaintiff upon settlement of the differences between plaintiff and defendant regarding rent, etc., based on the transfer of plaintiff's property as of July 1, 1905, and in full compliance with the terms of said contract, which was collected by plaintiff as aforesaid, and that notice had been given to plaintiff prior to December 21, 1905, of such fact, and plaintiff refused so to do.

"*Seventh.* That said plaintiff refused to settle the differences between himself and said defendant in regard to rents, etc., and to receive the deed to said lot which was offered to him as aforesaid, but on December 26, 1905, demanded the payment of $500 in cash, and upon plaintiff's refusal to pay sued defendant in this action for that sum, instead of accounting for and paying over to defendant rent due him as aforesaid, and accepting and receiving the deed to said lot as offered as aforesaid.

"*Conclusions of law:* First. That plaintiff is not entitled to recover in this action, and his complaint is dismissed upon the merits. Second. That said defendant is entitled to judgment against the plaintiff for the sum of $75 besides the costs of this action to be taxed."

Judgment was entered dismissing the complaint and awarding defendant $75 damages on his counterclaim, together with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Aarons & Niven,* and oral argument by *C. L. Aarons.*

Charles D. Mann, for the respondent.

KEEWIN, J. The plaintiff grounds his right to recover upon contract entered into June 22, 1905, by the terms of which it was agreed that in case the defendant should not be able to give a deed of lot 18 he would pay $500 on the 21st day of December, 1905. This contract must be construed with the one made June 3, 1905, and referred to in the statement of facts, the contract of June 22d being simply an ex-

tension of time given defendant to perfect his title to the lot in question, it appearing that at that time the title to this lot was in litigation. The sixth clause of the contract of June 3d, by which it was provided that each of the parties should be entitled to the possession and receipt of the rents and profits of the premises agreed to be conveyed from the 1st day of July, 1905, obviously continued in force after the execution of the agreement of June 22d, and was so intended by the parties. So when the deal should be finally consummated and the deed of lot 18 given by defendant, if he were able to convey a merchantable title, the plaintiff was under obligation, by force of the agreement between the parties, to carry out the provisions of the contract of June 3d, which remained unperformed, and which still continued in force after the execution of the contract of June 22d.

The plaintiff in his complaint claims the right to recover upon the express contract of June 22d, by the terms of which defendant promised to pay $500, but contends here that the case made is consistent with the theory of an action for damages on account of defendant's failure to convey, and that the $500 is in the nature of liquidated damages which plaintiff may recover on account of the breach. It is not very material whether we treat the plaintiff's claim to recover on one theory or the other, because in either case the action rests on the contract between the parties, and the question arises whether plaintiff has shown a right to recover $500 upon any theory under this contract. Clearly upon the established facts plaintiff cannot recover upon the letter of the contract, because it appears that defendant had a merchantable title to the lot and also the ability to convey it to plaintiff. The contract is that "in case I shall not be able to give then the deed I shall pay you the sum of $500 on the 21st day of December, 1905." As the facts clearly show, the defendant was in doubt June 22, 1905, whether he would be able to give a title to the lot, hence the agreement that he would pay $500 in case

he was unable to do so. This provision of the contract was manifestly intended as security to indemnify plaintiff against loss in case it should turn out that defendant could not convey a merchantable title to the lot. We think it clear that this is the true construction of the agreement between the parties, and that it was not contemplated that the agreement be in the alternative for the conveyance of the lot, or the payment of $500 in case defendant were unable to convey a good title. Now, even if it be conceded for the sake of argument that the plaintiff could recover in case of an absolute refusal to convey, we still think that the condition imposed here was reasonable and within the contract and contemplated by the parties when the contract was made, therefore the tender of the deed subject to the condition imposed was not a refusal to convey and gave plaintiff no right to recover the $500. If the defendant had refused to convey under any circumstances, the situation would be quite different. It is not necessary that we decide whether under such circumstances plaintiff could maintain an action to recover $500, or whether his remedy would be for specific performance, the defendant being able to convey title according to the terms of the contract. Here there was no refusal to convey within the spirit of the contract. On the contrary the deed was executed and tendered, subject only to the condition that plaintiff pay the amount which upon accounting in court it was found he was obliged to pay under the terms of the agreement of June 3d, and we think it was fairly within the contemplation of the parties under the contract that this amount should be paid at the time the deal was finally closed; and this being so, the condition attached to the delivery of the deed was within the contract and within the contemplation of the parties, and the tender of delivery of the deed subject to this condition was a good tender. The contention of the plaintiff that the deed should be first tendered absolutely and without condition or payment of the money due under the contract seems more

technical than substantial in view of the fact that the obligations of both parties under the contract were mutual.

We are therefore of the opinion that upon the facts established the tender of the deed subject to the condition of payment of $75 found to be due from plaintiff under the provisions of the contract was a sufficient tender, and the defendant, being able to convey a merchantable title at the time, complied with his agreement, and the court below was right in holding that the plaintiff could not recover and that the defendant was entitled to judgment on his counterclaim for the amount found due.

By the Court.—Judgment of the court below is affirmed.

LOTTER, Respondent, vs. KNOSPE, Appellant.

December 7, 1910—January 10, 1911.

Contracts: Writing: Failure to examine: When assent presumed: Fraud.

1. One who, through misrepresentation as to its purport, is induced to refrain from examining a writing given him by another will not, unless in an extreme case, be held to have assented to the contents of the document before they were in fact known to him. Reasonable diligence on the part of the recipient is all that is required.
2. Plaintiff paid money to defendant under an oral contract of sale and received back a writing which defendant told him was a mere receipt, but which in fact recited some parts of the contract, omitting a condition of the sale. Plaintiff did not examine the paper, but nine days later, pursuant to the condition, demanded return of his money and promptly began suit therefor. *Held*, that he had not assented to and was not bound by the writing as correctly embodying the oral agreement. *Boetwick v. Mut. L. Ins. Co.* 116 Wis. 392, and *Ripley v. Sage L. & I. Co.* 138 Wis. 304, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Curtis & Mock* and *Andrew Gilbertson,* and oral argument by *Mr. Gilbertson.*

Arthur A. Mueller, for the respondent.

BARNES, J. The court found that the plaintiff and defendant made a verbal contract by which plaintiff agreed to buy the defendant's stock of merchandise and book accounts, provided that the stock should not inventory to exceed $7,000 and the book accounts should not exceed $6,000. A payment of $1,000 was made on the purchase price three days after the oral agreement had been reached. A receipt was given plaintiff for such payment, which also recited in detail various provisions of the verbal contract, but omitted any reference to that portion of it making the sale conditional on the amount of the stock and the value of the book accounts. The inventory disclosed that the stock amounted to $18,000 and the book accounts to $11,000. The plaintiff refused to carry out the contract, and nine days after payment thereof demanded a return of the money advanced by him, and suit for recovery was begun a few days after the demand was made, which resulted in judgment in plaintiff's favor.

The appellant contends that it was the legal duty of the plaintiff to read the alleged receipt that was handed to him, and that he was chargeable with knowledge of its contents whether he read it or not, and that, knowing its contents, he assented thereto by his failure to advise the defendant that he repudiated the instrument because it did not correctly embody the oral agreement. In support of these contentions the cases of *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, and *Ripley v. Sage L. & I. Co.* 138 Wis. 304, 119 N. W. 108, as well as some others, are relied on. These two cases come nearer sustaining the appellant's view than any others that have been cited, and the question is, Does the case at bar fall within the principle of these decisions?

The plaintiff in the *Bostwick Case* brought an action to recover the premiums paid on a policy of life insurance, because of a fraud perpetrated by the agent of the insurer in making out the application for a different kind of a policy from that agreed upon. The kind of policy described in the application was issued and the policy was retained several months before the plaintiff examined the same or the letter which accompanied it, and therefore he did not discover the fraud. It was held that a person who receives from another a written instrument containing a statement of their contractual relations, and retains the same without reading it, is guilty of gross negligence and cannot be heard to say that he kept it in ignorance of its contents, and will be deemed to have assented to the terms of the writing. This statement was made with reference to the facts before the court in that case. In *Ripley v. Sage L. & I. Co., supra,* it was held that, where a person received by mail from another a statement showing the condition of the account between the parties as claimed by the debtor, together with a check for the balance shown to be due by the account, and the check was cashed and the account was retained without protest or objection for a period of two years and nine months, the law would conclusively presume assent to and acquiescence in the correctness of the statement rendered, and the recipient thereof would not be heard to question its accuracy. These cases do not call for the exercise of any unusual diligence on the part of the recipient of the writing, either in reading it or in registering his protest against it. It is impossible to formulate any hard-and-fast rule by which it can be determined what cases fall within and what fall without the principle of the cases cited. Each case must be considered with reference to the peculiar facts and circumstances which surround it. What might be a reasonable length of time within which action should be taken under some circumstances might not be where the circumstances were different.

In the case under consideration but nine days elapsed between the delivery of the alleged receipt and the demand for the return of the money. Suit was begun promptly. The plaintiff was told in substance that the instrument delivered to him was simply a receipt, that his check answered the same purpose, and that he might tear up the supposed receipt and throw it away if he wanted to. These statements were calculated to minimize the importance of the document and to lull the plaintiff into a feeling of security, and the trial court might well have concluded that they were made for the purpose of deceiving. Where a party is induced to refrain from making an examination of a paper given him by another, through misrepresentation as to its purport, it would be an extreme case that would warrant a court holding that there was an assent to the contents of the document before such contents were in fact known. *Warder, B. & G. Co. v. Whitish,* 77 Wis. 430, 46 N. W. 540; *Bostwick v. Mut. L. Ins. Co., supra.* All the decisions relied on seem to require is that a party exercise reasonable diligence, and, the trial court having held in substance and effect that such diligence was used, we do not think the finding should be disturbed.

By the Court.—Judgment affirmed.

PFEIFFER, Respondent, vs. RADKE, Appellant.

December 7, 1910—January 10, 1911.

Negligence: Automobiles: Frightening horses: Personal injury: Damages.

1. **A verdict to the effect that the defendant was negligent in not keeping to the right of the middle of the traveled track while running his automobile on the highway at night is *held* to be sustained by evidence substantially the same as that held to sustain a similar verdict in *Pfeiffer v. Radke*, 142 Wis. 512, which was an action growing out of the same occurrence.**
2. **For personal injuries sustained by a woman in the overturning of a buggy caused by defendant's negligence in running his automobile, an award of $800 (reduced from $1,500 by the trial court) is *held* to be sustained by the evidence.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action for damages to person. The jury found (1) that defendant's automobile frightened the horse behind which plaintiff was driven and she was injured as a result thereof; (2) that defendant did not drive to the right of the middle of the traveled track of the road; (3) that by the exercise of ordinary care he could have driven to the right thereof without injury to himself; (4) that his failure so to do was the proximate cause of plaintiff's injury; (5) that the driver of the horse was not guilty of a want of ordinary care that contributed to produce plaintiff's injury; and (6) that she was damaged in the sum of $1,500. Additional facts will be found in *Pfeiffer v. Radke,* 142 Wis. 512, 125 N. W. 934, which was a suit by plaintiff's husband growing out of the same occurrence. The trial court reduced the damages to $800 and rendered judgment for plaintiff. The defendant appealed.

H. L. Eaton, for the appellant.

For the respondent there was a brief by *James D. Shaw* and *William F. Schanen,* and oral argument by *Mr. Shaw.*

VINJE, J. 1. It is conceded by counsel for the defendant that this case, in so far as the evidence bears upon the question of defendant's negligence, is identical with that of *Pfeiffer v. Radke,* 142 Wis. 512, 125 N. W. 934, except that it is now shown the horse was frightened by water splashing on him, and that defendant turned to the left on account of the condition of the road. The question of defendant's negligence, therefore, is governed by the former case, unless the additional evidence necessitates a different disposition of it. The only evidence as to what frightened the horse is that of the plaintiff. In one place she testified, "I do not know whether it was mud frightened the horse or not." In another place she stated, "I think the horse became frightened because the water splashed on him;" and in still another place she said, "As this automobile passed it splashed water up and frightened the horse." The first statement disclaims knowledge on the subject; the second gives her opinion only. Counsel for defendant, however, depends upon the last statement as showing that the horse was frightened because water splashed on him. The statement is susceptible of that meaning. It can also be construed to mean that the witness states the existence of two facts, namely, that the automobile splashed up water and that the automobile frightened the horse. However, it is not material what construction is given to the statement, because if defendant was guilty of negligence in running the automobile as he did, then it is immaterial whether the horse became frightened by the splashing of water or by the splashing of mud or by the sound of the automobile or by any other cause or combination of causes, provided they were negligently produced by him. The defendant testified that he turned to the left, or "back into the road," as he says, on account of the condition of the highway. This evidence was certainly competent upon the question of his negligence, but the jury found against him on such question, and there is ample evidence to sustain their finding; for it is

a matter of common knowledge that a highway graded for a width of twenty-two feet with a crown in the center not exceeding a foot is a reasonably safe highway over the whole extent so graded, and there is no valid ground for claiming that an automobile such as the defendant used could not be safely operated over any particular portion thereof. Besides, the weight of the evidence tends to show that the crown of the highway did not exceed from six to eight inches.

2. An answer to the hypothetical question put to the expert witness Roesler was properly excluded, on the ground that no expert testimony was necessary on the subject, and on the further ground that the question omitted material, uncontroverted facts. Some of the instructions requested and not given were included in the general charge of the court. The others either contained an incorrect statement of the law, or else had no application whatsoever to any question in issue in the case and were therefore properly refused.

3. The jury assessed plaintiff's damages at the sum of $1,500. This was reduced by the trial court to $800. There is evidence in the case that for a whole year plaintiff's back was very sore and painful; that she could not work as she had worked before; that previous to this injury she was in good health, while since then her health has been more or less impaired and she has been unable to sleep nights and has been more or less nervous. The doctor who attended upon her testified that she is evidently suffering from a nervous fright and that he would expect her injuries to be permanent. This evidence is sufficient to sustain the verdict as reduced by the trial court.

By the Court.—Judgment affirmed.

FIRST NATIONAL BANK OF EVERETT, WASHINGTON, Appellant, vs. SNELL, Respondent.

December 7, 1910—January 10, 1911.

Contracts: Sale or agency? Custom: Measure of damages: Loss of profits.

1. Where the correspondence between a manufacturer of lumber and a jobber, with reference to a quantity of lumber ordered for a brewing company, in part indicated that a sale to the jobber was intended, and in part indicated a mere agency arrangement, the fact that a commission was allowed the jobber was not conclusive that he was simply a selling agent, especially in view of a general trade custom, found by the trial court to exist, to allow jobbers a special reduction from quoted prices, frequently spoken of as a commission, even when it was known that they were buying on their own account for resale at a profit; and, it appearing that the final order was given by the jobber in his own name and the invoices made to him as purchaser, and that he in turn contracted with the brewing company in his own name, collected the bills himself, and made his own settlements with the shipper, the evidence is *held* to sustain a finding of the trial court that the transaction was a sale to the jobber.
2. The ordinary measure of damages for failure to deliver goods on an executory contract of sale is the difference between the contract price and the market value at the time and place of delivery.
3. The exception to this rule which allows, under some circumstances, a recovery for loss of profits where the vendor knows the goods are bought to fill a pre-existing contract, does not apply to a case where it appears that the goods could be, and in fact a portion of them was, purchased in the open market.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Modified and affirmed.*

This is an action to recover $990.55 alleged to have been received by defendant for plaintiff's use. The defendant pleaded a counterclaim and brought into court $380.20 and costs theretofore incurred and denied any further liability. The action was tried by the court. The following facts appeared: In 1907 the defendant dealt in lumber at Milwau-

kee at wholesale and as a jobber for manufacturers. The Weidauer & Lansdown Co. (hereafter called the Weidauer Co.) was a corporation engaged in manufacturing and selling lumber at Everett, Washington, and the plaintiff was a banking corporation at the same place. On June 18, 1906, the defendant wrote the Weidauer Co. stating that one of the large breweries in Milwaukee wanted to buy a quantity of described fir lumber and requesting them to wire the best price they could name for the stock delivered at Milwaukee, "subject to a commission for me of fifty cents per M." On June 27th the Weidauer Co. replied by telegraph, giving a price of $40 "including commission," and on the same day sent a letter to the same effect. Some further correspondence took place, and on July 3d the defendant telegraphed the Weidauer Co. as follows: "Have sold three by eight fir. Particulars by mail." On the 9th of July *Snell* sent a letter giving the particulars, in which he said that he had succeeded in closing a trade for a part of the fir at $39 per M., and inclosed a written order as follows:

"Order No. 146. July 3rd, 1906.
M. Weidauer & Lansdown Co.
Ship to Jos. Schlitz Brewing Co.
At Chestnut St. Sta., Milwaukee.
How Ship ..... When See below.
Terms Reg. 60 ds or 2% upon arrival.
320 M. ft. 3x8x10′ 1st & 2nd
Clear Fir S2S 2¾″ $39.00
Del.
Frank N. Snell.
Invoice to me Milw.
50c per M. Com.
Shipments to commence about Oct. 1st & to be completed by about Jany. 1st to 15th.
See letter."

The letter also contained the following:

"You will notice by the order that we have considerably more time in which to fill it than I at first wrote *you we would*

have, so there ought to be no question about getting this out in splendid shape, *and as we want it.* I have promised these people some nice lumber, and am depending upon you. Please acknowledge receipt of this order, and in invoicing it be sure and put my order number on each invoice. We will advise you in case we want some of it earlier than Oct. 1st, or if we want shipments to commence a little later than that, and about how fast we can take care of it, probably about one car per week."

The Weidauer Co. accepted the order by letter on July 13th following. On July 3d the defendant made and delivered to the Schlitz Brewing Co. the following paper called an order:

"Order No. 145. July 3, 1906.
Frank N. Snell.
Ship to Jos. Schlitz Brewing Company, Chestnut St. Station, Milwaukee.
C., M. & St. P.
60 days or 2% for cash.
When ship: See below.
320 M. ft. 3x8x10′, 1st and 2nd Clear Fir, S2S, 2¾″, $41.00 del. FRANK N. SNELL."

The Weidauer Co. failed to commence shipments as agreed, and in January, 1907, the contract was modified by correspondence so that if three cars were shipped immediately and two more per week until the order was filled (cars being expected to contain about 20,000 feet each), the parties would be satisfied. This arrangement would have resulted in delivery of the whole order by April 8th. As matter of fact only six cars were shipped, aggregating 122,260 feet, the dates of shipment being as follows: March 8th, March 11th, April 12th, June 18th, and two cars July 6th. The amount undelivered on the contract was therefore 197,740 feet. *Snell* in order to carry out his contract with the brewing company purchased in the open market 117,740 feet, paying therefor in excess of the contract price with the Weidauer Co. the sum of $94.25. The balance of the order, amounting to 80,000 feet, was never filled either by the Weidauer Co. or by

Snell, but the brewing company went into the market and bought enough to satisfy their wants. The cars were invoiced directly to the defendant. The invoices of the first two cars were assigned to the plaintiff bank and were paid by the defendant's check to the plaintiff on May 10th, after deducting freight, commission, and two per cent. discount. The invoices for the shipments of April 12th and June 18th were also assigned to the plaintiff, together with the respective bills of lading therefor, amounting respectively to $762.06 and $830.70. The defendant received from the brewing company payment for the last named shipments (less the freight bills) amounting in the aggregate to $1,092.69, and it is for this sum, less commission and discount, that this action is brought, the defendant claiming to offset against this claim the aforesaid sum of $94.25 paid over and above the contract price on lumber purchased in the market, and the sum of $200, being lost profits on the 80,000 feet never delivered.

The court found that the relation between the Weidauer Co. and *Snell* was that of vendor and vendee, and that defendant was entitled to offset the said sums, amounting to $294.25, against the plaintiff's demand, and rendered judgment for the plaintiff for the balance due with interest, after deducting said offsets and the amount deposited in court, amounting to $344.45 with costs. The plaintiff contends that *Snell* was simply the agent of the Weidauer Co. in the transaction and not the purchaser of the lumber, and hence can recover no damages in excess of the unpaid commission in any event. From judgment in accordance with the findings the plaintiff appeals.

Chas. T. Hickox, for the appellant.

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *G. G. Gehrz* and *E. J. Gehrz.*

WINSLOW, C. J. There are two controlling questions in this case, one of fact and one of law. The question of fact is

whether *Snell* was a purchaser of the lumber for resale to the brewing company or was simply the agent of the Weidauer Co., employed by it upon commission to make the sale. In case *Snell* was a purchaser, the question of law which arises is whether he is entitled to offset lost profits upon the 80,000 feet of lumber never delivered to the brewing company.

1. The question whether *Snell* was a purchaser or a selling agent is not free from difficulty. The fact that his contract with the Weidauer Co. provided that he should have a commission of fifty cents per thousand is relied on as conclusive proof that he was simply an agent. We do not so regard it. It is true that it tends in that direction, as do some expressions in the correspondence, but there are other expressions in the correspondence and acts of the parties which tend in the other direction. It seems to be a case where some of the facts indicate that a sale was intended and others that a mere agency arrangement was intended. Thus it appears that the order was directly given by *Snell* to Weidauer & Co. with directions to invoice to him (*Snell*), and that the invoices were in fact made out in these words: "Sold to *Frank N. Snell,* Esq.," and sent by mail to him in all respects as if he were a purchaser. It also appears that *Snell* made a contract in his own name with the brewing company in all respects as though he were selling the lumber on his own responsibility; that he collected the bills himself, and made his own settlements with the Weidauer Co. So it is a case where there is some considerable confusion in the facts and where different conclusions might be drawn by different minds as to the relationship which the parties expected and intended should exist between them. There was also considerable evidence tending to show that it was a general and well known custom in the business, both in Wisconsin and Washington, that a wholesaler or jobber like the defendant be allowed a special reduction from quoted prices, frequently spoken of as a commission, even though it was understood that he was buying on

his own account for resale at a profit. The court found that such a custom existed and the finding seems to be based upon sufficient evidence.

Taking the entire evidence in the case, we are unable to say that the finding of the trial court on this question is against the clear preponderance of the evidence.

2. *Snell* being a purchaser for resale, the question arises as to the measure of his damages on breach of the contract by the vendor. Damages for failure to fulfil an executory contract for delivery of goods are awarded on the basis of compensation or indemnity, and the well understood general rule is that they consist of the difference between the contract price and the market value at the time and place of delivery.

"The basis of this rule is that, on failure of the vendor to deliver, the purchaser may go into the market and at the time and place of delivery, and supply himself with the same kind of goods at the market price." *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49.

Special circumstances sometimes require that exception to this general rule be made. For instance, where the article is one not to be obtained in the market and the vendor knows that it is purchased to fill a pre-existing contract, the damages for failure to deliver will be the difference between the contract price to the first vendee and the contract price to the second vendee, unless the second contract price be such as to yield an extraordinary and unusual profit. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119. This exception to the general rule does not apply here, because it is based upon the entire absence of a market and of a market price for the article, rendering the application of the rule a practical impossibility. In the present case it is proven that the lumber could be, and in fact some portion of it was, purchased in the market.

Another exception to the general rule is noted in *Foss v. Heineman, ante,* p. 146, 128 N. W. 881, but it has no application here.

The court found on sufficient evidence that the market price of the lumber in question at the time and place of delivery was $39.50 per M. As the contract price to *Snell* was $38.50 per M., his damages for the nondelivery of 80,000 feet were $1 per M. instead of $2.50 per M., as the court allowed him. In other words, the allowance on defendant's counterclaim was too much by the sum of $120.

The judgment should be modified as of its date by adding to the sum allowed to the plaintiff the sum of $120, making the total amount of the plaintiff's recovery $564.67, damages and costs.

By the Court.—Judgment modified with costs as indicated in the opinion, and as so modified affirmed.

CLINE, Respondent, vs. WHITAKER, Appellant.

December 7, 1910—January 10, 1911.

Injunctional order binding though erroneous: Jurisdiction: Issuance in legal action.

1. However erroneous an injunctional order may be in the sense of wrong or inexcusable use of judicial power, it is binding on the person restrained and efficiently notified thereof till set aside in some proper proceeding.
2. The saying that an injunctional order is good till set aside, if the court making it had jurisdiction of the subject-matter, is to be understood, as to the word "jurisdiction," to refer to the existence or nonexistence of judicial power, and as to the word "subject-matter" to such subjects between the parties.
3. If, in a given situation, there is any valid ground upon which a temporary injunctional order might, under any circumstances, be properly issued, though none be stated in the complaint, and it would be highly erroneous, even jurisdictionally wrong in the sense of inexcusable use of judicial authority, to allow such an interference and such allowance nevertheless occurs, it is erroneous, not void, and cannot properly be defied.

4. As regards an injunctional order, "if the court's command is within its power to make under any circumstances upon any grounds and for any reasons whatever, the person enjoined is bound to obey till the order shall have been vacated."
5. A temporary injunctional order may be issued, under some circumstances, in a legal action.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff commenced an action to recover damages from defendant for, as charged, having maliciously injured his business by publishing and distributing circulars containing false and defamatory statements concerning it. Upon a complaint stating a cause of action for damages for the wrong alleged, and an affidavit to the effect that such wrong was continuous and was threatened to be seriously active pending the litigation, supported by an affidavit by one Johnson, the court granted a temporary injunctional order restraining defendant from continuing the alleged wrong. Subsequently to the service of the order on defendant, plaintiff informed the court, in due form, that the former had violated it, whereupon defendant was, in due form, requested to show cause, February 26, 1910, why he should not be punished for contempt. Before such order was heard the injunctional order was, on motion, set aside with costs.

The hearing in the contempt proceedings was, in due time, had, resulting in defendant being found guilty and adjudged to pay a fine of $25 and $8.18, costs and expenses, and to be committed till payment should be made. The appeal is to review such determination.

W. B. Rubin and *W. C. Zabel,* for the appellant.

David E. Johnson, for the respondent.

MARSHALL, J. Is a temporary order void, made by a circuit court incidental to an action therein for damages for publication and circulation, by the one restrained, of circulars, con-

taining libelous matter of and concerning plaintiff and his business, preventing continuation of the wrong pending the action? That is the vital question upon this appeal.

However erroneous the order in question may have been, or even if it were jurisdictionally bad, in the sense of inexcusable use of judicial authority, as distinguished from want of power under any circumstances to make the same, it was binding on appellant till set aside in some proper proceeding to that end. *State ex rel. Fowler v. Circuit Court,* 98 Wis. 143, 73 N. W. 788. Wilful disobedience of such an order, however improvidently issued, in the sense of an erroneous use or even abuse of power, is a criminal contempt. In the case cited, the court, in harmony with authority generally, said in effect: An injunctional order, within the power of the court, must be implicitly obeyed so long as it stands. It is not outside the power, if the court has jurisdiction of the subject-matter, as said in *State ex rel. Fowler v. Circuit Court, supra,* or perhaps more accurately said in *Davis v. Mayor, etc.* 1 Duer, 451, unless there is a want of jurisdiction.

In dealing with such a matter as this the distinction between total want of jurisdiction; absolute absence of power, and want of jurisdiction, in the sense the term is commonly used, characterizing judicial action which is so highly erroneous as to be without legal justification, yet not, as has been said, beyond competency to err,—must be kept in mind. The two phases of jurisdiction were discussed at considerable length in *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909, one being termed want of power and the other inexcusable departure from established principles;—a gross misuse of power. The former is a usurpation. The resulting judgment or order is totally void. The latter is mere error. The resulting judgment is valid, till avoided in proceedings to that end. Defiance of one is wrongful. Defiance of the other is not.

It is commonly said, in reference to this subject, that if the court does not have jurisdiction of the subject-matter in an action its order or judgment entered therein is void. The word "subject-matter" is liable to be as misleading as the word "jurisdiction." The latter is commonly used when want of power is not meant. The former is commonly used, merely to denote want of jurisdiction of the subject-matter of the action in the particular instance and in the particular way judicial power is invoked, and also as characterizing disability to judicially deal with such subjects between the parties under any circumstances. It is in the latter sense only that an order of the sort in question is a usurpation and may safely be disregarded.

It follows from the foregoing that, if it be true, as counsel for appellant claim, that a temporary restraining order in a legal action is improper, nevertheless if the court could, under any circumstances, deal with the subject between the parties by such an order, then the judicial act would not be void. But, it is not correct to say, there is no warrant for an interim restraining order in a legal action. Sec. 2773, Stats. (1898), specifies circumstances in such actions where such an order may be granted. Moreover, the complaint and the affidavits upon which the order in question was granted disclose a situation which might have been so presented for relief as to have rendered the act complained of proper. It was a legitimate subject for the court to deal with, though judicial power was not invoked in such a way as to warrant the action taken. That does not appear upon the face of the order, but does upon that of the complaint. So the order was plainly erroneous, perhaps jurisdictionally bad, in the sense of negligent inexcusable use or abuse of authority, but not a usurpatious act.

It should be understood that if in a given situation there is any valid ground upon which a temporary injunctional order might, under any circumstances, be issued, though none be

stated in the complaint and such an order is nevertheless allowed, it is not void. In case of the person restrained being so circumstanced as to be bound to submit if it is not void, he must, in the main, at least, look to the order only. If that is good on its face, in that it relates to a subject within the jurisdiction of the court, and otherwise appears regular, the duty to obey is plain. The person enjoined has no right to shape his course by merely what the complaint discloses. It may not state any cause of action and yet be subject to amendment in that regard. The complaint may not state facts warranting relief for which a temporary injunctional order is incidental, and yet such facts exist. The one enjoined cannot pass upon any of such questions and obey or defy the court according to his decision. As said, substantially, in the leading case of *Davis v. Mayor, etc., supra,* if the court's command is within its power to make under any circumstances upon any grounds and for any reason whatever, the person enjoined disobeys at his peril.

The result of the foregoing is that the circuit court did not usurp authority in this case. Therefore, the wilful violation of its order was a criminal contempt. *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 668, 81 N. W. 1046; sec. 3477, Stats. (1898).

Some other questions are discussed by counsel and have been considered, but do not seem to have sufficient merit to warrant treating them in detail, or really in discussing them at all. They do not involve error affecting the substantial rights of appellant.

By the Court.—Judgment affirmed.

STATE EX REL. BURKE, Respondent, vs. HINKEL, City Clerk, Appellant.

December 8, 1910—January 10, 1911.

Constitutional law: Justices of the peace: Jurisdiction: Statutes: Partial invalidity: Elections: Mandamus: *Appeal after election.*

1. An act (ch. 544, Laws of 1909) providing in substance that in counties having a population of 150,000 or over justices of the peace thereafter elected should have jurisdiction only in actions in which the amount claimed or involved did not exceed one dollar, and that such justices in cities of the first class should receive an annual salary of $25 in lieu of fees, and should not practice as attorneys in any courts of the county, but should each hold court and keep it open for business for at least six hours in each day for eleven months in the year, is *held* invalid as a violation or attempted evasion of secs. 2, 15, art. VII, Const., which invest justices of the peace with judicial power and provide that they shall be elected in towns, cities, and villages in such manner as the legislature may direct and their number and classification shall be regulated and their jurisdiction prescribed by law.
2. The void parts of such act embrace the dominant purposes thereof and, being the inducements to the enactment of the other portions, the whole act is void.
3. Although in a proceeding by *mandamus* to compel the placing of relator's name on a primary ballot there were delays so that the primary and the election passed, and the trial court thereafter adjudged that relator would have been entitled to the writ and awarded costs to him, the questions involved are properly before the supreme court on appeal from such judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The amended petition in this proceeding alleges that between the 1st day of February and the 7th day of March, 1910, the petitioner was nominated for the office of justice of the peace on the Democratic ticket in the Fourth district, composed of the Fourth and Sixteenth wards of the city of Milwaukee, and that his nomination papers were duly and properly signed by a sufficient legal number of qualified electors;

that the petitioner has accepted the nomination and has signed a written declaration that if elected he would accept the office; that the nomination papers and the above mentioned declaration had been tendered to the city clerk and that the city clerk had refused to receive them; and that the clerk refuses to place the petitioner's name on the primary ballot or on the voting machines as a candidate for the office. A writ of *mandamus* was asked commanding the city clerk to receive and file the nomination papers and to place the petitioner's name on the primary ballot and upon the voting machines as a candidate in the Fourth district for the office of justice of the peace to be voted for at the primary election and the election. Because of the delay incident to amending the petition, the return, and the other proceedings in the matter, the court did not act upon it until after the election had been held. The court held that relator would have been entitled to the writ prayed for, because ch. 544, Laws of 1909, is unconstitutional and void, and awarded judgment giving the relator his costs. This is an appeal from the judgment.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, of counsel, and oral argument by *Mr. Williams.*

For the respondent the cause was submitted on the brief of *W. J. Kershaw.*

SIEBECKER, J. Art. VII, sec. 2, of the state constitution provides:

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace."

Sec. 15 of the same article provides for the election of justices of the peace in towns, villages, and cities in the manner to be prescribed by the legislature for the terms of two years, and that

"Their number and classification shall be regulated by law. And the tenure of two years shall in no wise interfere with

the classification in the first instance. The justices thus elected shall have such civil and criminal jurisdiction as shall be prescribed by law."

The charter of the city of Milwaukee (ch. II, sec. 3) provides that the several officers enumerated, among them justices of the peace, shall be elected by the people, and also provides (ch. II, sec. 6) that the Fourth and Sixteenth wards of the city shall comprise the fourth of the election districts into which the city is divided for the purpose of electing justices of the peace.

Ch. 544 of the Laws of 1909 was designed to provide for and regulate the number of justices of the peace in counties having a population of 150,000 inhabitants or over, to prescribe their jurisdiction, to regulate the time of holding their courts, and fixes the compensation of justices of the peace in cities of the first class, in lieu of fees, which they are required to collect and pay over to such cities. Among the provisions of this act are the following:

"The justices of the peace which may hereafter be elected in any such county shall have jurisdiction of the actions and proceedings specified in sec. 3572 of the statutes, only when the amount claimed or involved in such actions or proceedings shall not exceed the sum of one dollar." (Sec. 1.)

"Every justice of the peace hereafter elected in cities of the first class shall receive an annual salary of twenty-five dollars to be paid in monthly instalments in the same manner as the salaries of the other officers of such cities are now paid." (Sec. 2.)

"All fees paid to justices of the peace hereafter elected in cities of the first class shall belong to the city in which they are elected and shall be paid by them to the city treasury of such city." (Sec. 3.)

"Hereafter each justice of the peace elected in cities of the first class shall hold court for the trial of actions of which he has jurisdiction. Said court shall be open for the transaction of business for at least six hours during each day of the year (Sundays and holidays excepted) and shall be held by such justice, except that he shall be entitled to a vacation of

not exceeding four successive weeks in any one year, during which time he shall not be required to hold court." (Sec. 5.)

"No person hereafter elected to the office of justice of the peace in cities of the first class shall practice as an attorney in any of the courts of the county in which such cities are located." (Sec. 6.)

The trial court held the act invalid upon the ground that its provisions evinced a purpose on the part of the legislature to evade the constitutional mandate providing for the election of justices of the peace and that their number and their jurisdiction should be prescribed by the legislature. The constitutional provisions invest justices of the peace with judicial power (art. VII, sec. 2) and prescribe (art. VII, sec. 15) that the electors of the several towns, cities, and villages shall elect justices of the peace in the manner directed by the legislature, and that their number, classification, and jurisdiction shall be regulated by law. Under these provisions of the constitution it devolves on the legislature to provide the manner of their election, to regulate their number and classification, and to prescribe their jurisdiction. The question is, Has the legislature exercised its powers in conformity with this obligation? The court held that the legislative action embodied in this act (ch. 544, Laws of 1909) failed to comply with these constitutional conditions, in that the provisions of this chapter, in their effect, operated to evade them, and that the legislature, under claim of exercising its authority to regulate justices of the peace, had indirectly deprived them of their powers, so that they were practically prevented from exercising the functions of the office. There can be no question that if the legislature, under the claim of a lawful authority, so acted that it in effect deprived justices of the peace of their judicial powers, then the act opposes the obvious purposes and objects of this constitutional arrangement. It requires no elaboration to show the purposes and objects of the people in adopting the constitutional provisions declaring that the electors should elect justices of

the peace and investing them with judicial power. A reference to the facts and circumstances pertaining to the existence of this office and the usual functions exercised by the incumbents at the time of the adoption of the constitution shows what was contemplated by the framers of the constitution and the electors at the time of its adoption. Such history points out the facts that justices of the peace exercised the judicial power of the state as conservators of the peace and were vested with power to hear and determine controversies between persons pertaining to their private affairs of minor importance. The context of the foregoing constitutional provisions confirms these purposes by establishing the office, granting the incumbents judicial power to perform these functions, and imposing upon the legislature the duty to prescribe their number and jurisdiction. These positive directions to the legislature to provide for carrying into effect the powers directly vested in justices of the peace evince an intent and object that these officers were to exercise the functions attached to the office in the usual manner, and imply that any legislation on the subject which would frustrate these evident purposes is a violation of these constitutional conditions. Such legislation as destroys the powers of justices of the peace cannot be treated as valid, because it would be accomplishing an unlawful object under pretext of exercising a lawful authority. The manifest objects and purposes of these provisions were that justices of the peace should be elected and that they were to exercise the judicial power in a manner and to an extent necessary to administer justice freely and promptly within their accustomed restricted jurisdiction. To accomplish these ends the legislature was directed to regulate their number and classification and to prescribe their jurisdiction. This implies that legislative action within this field is to be so framed as to enable justices of the peace to exercise their powers to an extent commensurate with the necessities of the public and in such a manner as to pro-

tect the people's interests and to promote their convenience. The provisions of ch. 544, Laws of 1909, must be tested by these constitutional conditions. The act applies only to municipalities in counties of 150,000 inhabitants or over and cities of the first class. We need not specifically consider the necessities and interests of the people of such communities as to the number, classification, and jurisdiction of justices of the peace within their respective municipalities, for the objections raised to this legislation are equally applicable to all justices of the peace throughout the state. The provisions assailed as invalidating the law are the provisions (1) that the jurisdiction of justices of the peace in such cities shall only be exercised in actions and proceedings wherein the amount in controversy shall not exceed one dollar, such limitation not applying to such justices in cities of the third and fourth classes; (2) that all justices of the peace in cities of the first class are to receive a salary, to be paid by the city, of $25 annually in lieu of fees, which, except the fees paid for making a return upon appeal, are to be collected by them and turned over to the city; (3) that the justices of the peace elected in such cities shall hold court each day, excepting for four weeks in the year and Sundays and legal holidays, that the court shall be kept open for a period of six hours each day, and that such justices shall not practice as attorneys in the courts of such county.

The enforcement of these provisions would manifestly so operate as to effect a practical abrogation of the powers of such justices. It is obvious that no person can reasonably be expected to perform all the duties of the office, maintain a court, and keep it open for the conduct of business six hours daily for eleven months in a year at a salary of $25 per annum, in lieu of the statutory fees which are to be turned over to the city. It is self-evident that these regulations are arbitrary and unreasonable and evince a purpose to make the performance of the functions of the office so burdensome as to

deter persons from assuming its duties and to cast odium upon it. Such treatment of the office is in violation of the plainest implications of the constitutional provisions pertaining to it. While the jurisdictional limitation of the amount in controversy to one dollar in actions and proceedings specified in sec. 3572, Stats. (1898), is not as clearly indicative of the purpose to so regulate the jurisdiction as to practically deprive justices of the peace of the exercise of judicial power in such cities, it obviously operates to aid in accomplishing such a purpose. A jurisdiction limited in amount to controversies involving only one dollar is well nigh the border line of non-jurisdiction, and a court so limited as to the amount upon which to exercise its functions will more likely be treated with ridicule and contempt than with the respect customarily accorded to judicial tribunals. Viewing these regulations in the light of their actual operation, it is clearly manifest that they accomplish indirectly what, concededly, cannot be done directly, namely, they practically operate to deprive justices of the peace of the exercise of the judicial power vested in them and thus evade the provisions of the constitution establishing the office and directing that the legislature regulate their number and their jurisdiction so as to enable them to perform this public function conformably to the purposes manifested by the people of the state and embodied in this constitutional arrangement.

We are of the opinion that the circuit court correctly held that this legislative action was an unlawful exercise of this legislative function in prescribing the foregoing conditions and jurisdiction for the exercise of the judicial power of justices of the peace.

It is contended that those portions of the act which are involved are distinct from the other portions and that therefore they are separable therefrom and can be held to be independent. The various parts of this act are not severable into separate and complete regulations of any branch of the subject

it embraces and hence cannot be upheld in part and rejected in part. Furthermore, it is obvious from the context of the act that the void parts of the act embrace the dominant purposes of the legislation and were the inducements to the enactment of the other portions. Under these circumstances the whole of the act must fall with the invalid portions. Since the act must be declared invalid, no other questions presented by counsel need be considered.

Though the primary and the general election have taken place, the questions presented are properly here on appeal within the rule applied in *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482, and *State ex rel. Treat v. Hammel,* 134 Wis. 61, 114 N. W. 97.

By the Court.—Judgment affirmed.

DRISCOLL, Respondent, vs. ALLIS-CHALMERS COMPANY, Appellant.

December 8, 1910—January 10, 1911.

Master and servant: Unsafe working place: Duty of master: Building operations: Negligence of fellow-servants: Assumption of risk: Proximate cause: Special verdict: Concurring causes: Evidence: Competency: Form of objection: "Accident:" Instructions to jury.

1. The duty of the master to furnish a reasonably safe working place for his servants being absolute, if he delegates such duty to another the negligence of the latter in that regard will be imputed to the master.
2. Defendant was building additions to its plant, carrying on the work through its different departments which employed a large number of men. Plaintiff, of the steamfitters' department, was working at a pipe in a trench over which the carpenters' department had constructed a plank runway for the use of the men in the different departments in carrying materials. While passing over this runway, a helper in the equipment department dropped a heavy wooden block which struck and injured plaint-

iff. The evidence tended to show that the runway was not substantially built and that while it was being used the trench below was not a reasonably safe working place; that plaintiff had refused to work in the trench while the runway was in use; and that his foreman had promised that it should not be used while he was at work. *Held*, that defendant could not escape liability on the ground that the acts and conditions causing the injury were mere working details of the building operations and that the negligence of the helper who dropped the block and the failure of plaintiff's foreman to make the working place safe by preventing use of the runway were negligence of plaintiff's fellow-servants, for which the master was not liable. WINSLOW, C. J., and BARNES, J., dissent.

3. Evidence that it was customary for the foremen to arrange for protection of the employees; that plaintiff's foreman assumed the right and had at least apparent authority to prevent use of the runway while plaintiff was at work in the trench; and that plaintiff relied upon his promise and apparent authority and was reasonably warranted in so doing and did not know that the runway was in fact being used, was sufficient to support a finding by the jury that plaintiff did not assume the risk.
4. Findings in the special verdict that defendant's failure to provide plaintiff with a safe working place was the proximate cause of the injury, and also that negligence of the employee who dropped the block was such cause, constituted a sufficient finding of proximate cause, defendant being chargeable with the consequences of both negligent acts and the injury being the natural and probable result of their concurrence.
5. If plaintiff's working place was unsafe because of the runway and the employee carrying the block dropped it because of the unsafe condition of the runway, defendant is chargeable with the result, even though no negligence was shown on the part of such employee except in going over the runway with the block.
6. Evidence as to other instances of alleged danger in the work plaintiff had been ordered to do, to which he had objected and which had been remedied before the work was done, was admissible as tending to show the custom of the foremen to arrange with one another to guard against dangers and for the purpose of showing that plaintiff was justified in relying upon the promise of his foreman as to nonuse of the runway.
7. Where evidence is admissible for any purpose, a mere general objection thereto is properly overruled.
8. In an action for personal injuries alleged to have been caused by defendant's negligence, an instruction to the jury relative to the

question whether the injuries were the result of an accident, to the effect that an accident cannot happen if reasonable care to prevent it has been taken, is erroneous.

9. A further instruction that the burden of proof on the question of accident was upon the defendant, was erroneous because putting upon defendant the burden of proving that he was free from negligence.

10. Error in an instruction to the jury is not cured by the fact that the law upon the subject was correctly stated elsewhere in the charge.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This action was brought to recover damages for personal injuries alleged to have been sustained in consequence of the negligence of the defendant. The answer, after certain admissions, denies generally the material allegations of the complaint. At the close of the plaintiff's evidence a motion for nonsuit was denied, and at the close of all the evidence defendant moved for a directed verdict, which was denied. The defendant requested the submission of certain questions to the jury, which was denied, and also excepted to certain of the questions submitted to the jury. The jury returned the following verdict:

"(1) Was the plaintiff on the 31st day of January, 1908, while at work in a trench in defendant's new power house at West Allis, injured by a block of wood falling on his back? *A.* Yes (by court, with consent of counsel).

"(2) Was the plank runway over the trench at the power house, and under which plaintiff was working when injured, constructed by employees of defendant in such manner as to be reasonably safe and sufficient for the purposes intended? *A.* No.

"(3) Was the said plank runway in a reasonably safe and sufficient condition for the purposes intended, at the time when plaintiff was injured? *A.* No.

"(4) If you answer question 3 in the affirmative you need not answer this question. Otherwise answer this question: Had such unsafe and insufficient condition of said runway

existed for such a period of time that the defendant in the exercise of ordinary care ought reasonably to have known thereof and had reasonable opportunity to have remedied the same at the time when plaintiff was injured? *A.* Yes.

"(5) Was the place in the trench where *Driscoll* was ordered to cut the pipe and put in a tee and valve a reasonably safe place for him to work, if, at the time plaintiff performed his work there, other workmen of defendant company were permitted to use such planks to move or carry materials from one side of the trench to the other over said planks? *A.* No.

"(6) If you answer question No. 5 in the affirmative then you need not answer this question. Otherwise answer this question: Was such unsafe and insufficient condition of such runway open and obvious to a person of ordinary care and prudence engaged in the work which plaintiff was performing at and prior to the time of his injuries? *A.* Yes.

"(7) Did plaintiff's foreman, Jacob Williams, on the day before plaintiff was injured, assure plaintiff that the runway would not be used by the workmen of defendant while plaintiff was working in the trench under the runway? *A.* Yes.

"(8) If you answer question 7 'Yes,' then did the plaintiff, relying on such assurance, enter the trench to cut the pipe and provide the same with a tee and valve, as he was ordered to do? *A.* Yes.

"(9) Ought the defendant or its representatives, in the exercise of ordinary care, reasonably to have known that the place in the trench where the plaintiff was ordered to cut the pipe and provide the same with a tee and valve was not a reasonably safe place to do such work, if at the time when plaintiff was doing such work other workmen were allowed to carry materials over such plank? *A.* Yes.

"(10) If you answer question 5 'No,' then answer this question: Was the defendant's failure to provide plaintiff with a reasonably safe place to do the work of cutting the pipe and putting in a tee and valve the proximate cause of plaintiff's injury? *A.* Yes.

"(11) Did Earl Rasmussen, an employee of the defendant, while passing over the runway in question, negligently drop the block which injured the plaintiff? *A.* Yes.

"(12) If you answer question No. 11 'Yes,' then answer this question: Was such negligence the proximate cause of plaintiff's injury? *A.* Yes.

"(13) Did any failure on the part of plaintiff to exercise ordinary care at the time and place in question contribute proximately to cause his injuries? *A.* No.

"(14) Was the said runway used while plaintiff was on said job? *A.* Yes.

"(15) If you answer question 14 in the negative then you need not answer this question. Otherwise answer this question: Was such use of said runway known to the plaintiff at or prior to the accident in question? *A.* No.

"(16) If you answer question No. 14 in the negative then you need not answer this question. Otherwise answer this question: Was the use of said runway such that the plaintiff, in the exercise of ordinary care, ought reasonably to have known thereof? *A.* No.

"(17) If you answer the seventh question 'No,' then answer this question: Did the plaintiff assume the risk of injury from the wooden block being dropped by a fellow workman so as to fall upon him, under the conditions of the work which existed at the time and place in question? *A.* ——.

"(18) If you answer question No. 7 'Yes,' then answer this question: Did plaintiff assume all risks of injury, if any, arising from the failure by Jack Williams, his foreman, to see to it that the runway in question was not used while plaintiff was on the job of putting in a tee and valve in the pipe at the bottom of the trench? *A.* No.

"(19) Was plaintiff injured at the time and place in question, as the result of an accident? *A.* No.

"(20) If the court shall be of the opinion that the plaintiff is entitled to recover, at what sum do you assess the plaintiff's damages? *A.* $20,000."

Defendant also moved for judgment notwithstanding the verdict, for changes in the special verdict, and that the verdict be set aside and a new trial granted, which motions were denied and judgment rendered in favor of the plaintiff on the verdict, from which this appeal was taken.

For the appellant there were briefs by *Harper & McMynn,* attorneys, and *Max W. Babb,* of counsel, and oral argument by *Mr. R. N. McMynn* and *Mr. Babb.*

Harry M. Silber, attorney, and *A. J. Schmitz,* of counsel, for the respondent.

The following opinion was filed January 10, 1911:

KERWIN, J. The questions of fact litigated upon the trial are quite fully presented in the special verdict, which is set out in the statement of the case. At the time of the injury plaintiff was a married man thirty years of age, and his family consisted of his wife and two children. The defendant was engaged in building large additions and extensions to its plant, including a new power house and equipments. The plaintiff was injured January 31, 1908, while at work in a trench in the new power-house basement by a heavy wooden block falling upon him. Over 4,000 men were employed by the defendant at the time, and the work was carried on through different departments, among them being the carpenters' department and steamfitters' department, the plaintiff belonging to the latter. A plank runway had been constructed over the trench in which plaintiff was working, which runway was used by men engaged in other departments of the work. The trench extended across the basement of the building in process of construction from the south to the north and was from seven to eight feet wide and from five to six feet deep. One L. F. Bower was vice-president of the defendant and C. E. Search general superintendent. Edward Killingstad was foreman of the carpenters' crew and Jake Williams of the steamfitters' crew. The runway was constructed across the trench where plaintiff was engaged when injured some two weeks before the injury, under the direction of the foreman of the carpenters' department, over which to carry material in the construction of the work. The plaintiff did some work in the trench on January 30, 1908, upon a pipe which was near the bottom of the trench, probably less than a foot above the bottom, and on the 31st, in the forenoon, he was at work completing the job, working in a stooping position, when a block fell and injured him. There was also an equipment department engaged in the work, which depart-

ment at the time of the injury was engaged in running up a new condenser a few feet from the runway in question.

The evidence tends to show that at the time of the injury one Rasmussen, a helper, was engaged in assisting the equipment department, and that he dropped the block upon plaintiff; that the runway was constructed of three planks, each ten inches wide and two inches thick and from fourteen to twenty feet long, resting upon a cement floor at one end and upon a pipe, which was some six inches above the floor, at the other end, which pipe was suspended from the ceiling or another pipe above by ropes; that these three planks were placed about half an inch apart, and were thrown across the trench, not nailed or fastened, and when walked upon would spring down a considerable distance.

There is also evidence tending to show that plaintiff refused to work in the trench while the runway was being used, and that prior to the injury Jake Williams, plaintiff's foreman, promised that the runway would not be used while plaintiff was at work in the trench, and that no one should bother him, and that plaintiff relied upon such promise; that plaintiff worked under the runway on January 30th from 2 to 4:30 p. m., and on the 31st, the day he was injured, from about 8 a. m. to some time between 9 and 10 a. m., and that he did not know of the use of the runway while he was in the trench before he was injured.

Plaintiff was injured while he was in a stooping position calking the pipe at the bottom of the trench, and the evidence shows that it was noisy, all engines, one being right above him, working; there were laborers from twenty-five to fifty feet east of him, also south of him thirty to forty feet; that the planks over the trench were loose, not fastened together nor supported in the middle, no cleats under them, and were springy; that the man who dropped the block on plaintiff was not working in plaintiff's crew, but was a helper of an erecting engineer.

1. The principal contention of the appellant is that under the established law of this state the negligence alleged and relied upon by the plaintiff here is the negligence of a fellow-servant of the plaintiff, therefore was among the risks assumed, because it is said that the undisputed facts show that all the causative acts and conditions related with or leading to plaintiff's injuries concerned and were a part of the building operations of the defendant and known to the plaintiff, and that the labor was that of the plaintiff and his fellow-servants, hence they were engaged in a common employment, and the negligence of one resulting in injury to another was merely the negligence of a fellow-servant, for which no recovery can be had. It is further argued that every act relating even remotely as a cause, condition, or occasion of plaintiff's injury was one of the mere working details of the common employment of the plaintiff and his fellow-servants; that the construction of the runway was for temporary use in removing dirt and concrete and in foot travel by plaintiff's fellow-servants; that the negligence of Rasmussen in respect to the fall of the wooden block was a working detail by a fellow-servant of plaintiff, and that the same is true regarding the alleged promise by the plaintiff's foreman as to the nonuse of the runway. And upon these propositions counsel for appellant rely on several Wisconsin cases, notably *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429; *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, 107 N. W. 289; *Williams v. North Wis. L. Co.* 124 Wis. 328, 102 N. W. 589; *Grams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586; and the late case of *McKillop v. Superior S. Co.* 143 Wis. 454, 127 N. W. 1053. Of course the duty of the master to furnish a reasonably safe working place for employees in the discharge of their duties is well established; likewise that defendant cannot escape liability by delegating such duty. So the main questions are whether the defendant furnished a reasonably

safe working place, and whether it can escape liability for the injuries sustained on the ground that the negligence was that of a fellow-servant for which defendant was not liable, or whether the plaintiff assumed the risk.

Whether the trench under the runway was a reasonably safe place for plaintiff to work while being used for the purposes for which it was constructed, we think was a jury question. Obviously plaintiff did not regard it safe, therefore refused to work in it until assured by the foreman that it would be made safe while he was engaged in doing the work under it which he was ordered to do. Moreover, the evidence, some of which we have heretofore referred to, was ample to warrant the jury in finding that the place was unsafe.

But it is insisted that if the place was unsafe such condition was due to the negligence of a fellow-servant of plaintiff, therefore under the authorities before cited the plaintiff cannot recover. But the authorities relied upon by appellant do not control the instant case. In *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429, a safe place was furnished and the injury resulted through the negligence of co-employees engaged at the time of the injury in a common employment with the plaintiff. Plaintiff and other employees were engaged in moving timbers from the yard to places where they were to be framed into the building and in framing them as the building was in process of construction, hence were carrying out operative details of the work. In *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, 107 N. W. 289, there was a common employment in the performance of the work out of which the injury arose, and although the negligence was that of the foreman it was held nevertheless the negligence of a fellow-servant. The court said (page 40): "As indicated in some of the cases cited, the mere fact that the negligent person happened to be such foreman did not prevent him from being the fellow-servant of the men." In

Williams v. North Wis. L. Co. 124 Wis. 328, 102 N. W. 589, a safe place was furnished, and the general rule was laid down that

"When the master has provided a safe place, safe tools, competent and careful co-employees, and has given sufficient warning of hidden or latent dangers, he may doubtless commit to the employees the details of the work, including incidental repairs or readjustment of machinery made necessary by ordinary prosecution of the business, and which can easily be made by the employees themselves from proper materials furnished by the master; and such servants, thus prosecuting the work or making such readjustment or incidental repairs, become fellow-servants, whatever their rank, so that the negligence of one by which others are injured is the negligence of a fellow-servant. . . . The present case falls within this principle so far as the defendant company is concerned. The changing of the armature was a detail of the business which might properly be left to the employees themselves."

To the same effect are *Grams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586, and *McKillop v. Superior S. Co.* 143 Wis. 454, 127 N. W. 1053.

The case before us is not one falling within the rule of a mere working detail in a common employment, where the negligence of the superior servant is the negligence of a fellow-servant within the rule which forbids recovery in such cases. *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635; *Massy v. Milwaukee E. R. & L. Co.* 143 Wis. 220, 126 N. W. 544; *Halwas v. American G. Co.* 141 Wis. 127, 123 N. W. 789; *Rankel v. Buckstaff-Edwards Co.* 138 Wis. 442, 120 N. W. 269; *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 105 N. W. 911; *Jarnek v. Manitowoc C. & D. Co.* 97 Wis. 537, 73 N. W. 62; *Cadden v. American S. B. Co.* 88 Wis. 409, 60 N. W. 800; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409. The duty of defendant to furnish a reasonably safe working place being absolute, if such duty be delegated by the master to another, negligence in that regard by such other will be imputed to the master.

Jarnek v. Manitowoc C. & D. Co., supra. The case before us falls within this rule. *Cadden v. American S. B. Co., supra; Holloway v. H. W. Johns-Manville Co., supra; Eingartner v. Ill. S. Co.* 94 Wis. 70, 68 N. W. 664, and numerous other cases in this court. In *Holloway v. H. W. Johns-Manville Co., supra,* the boiler was prepared by the night crew, to which plaintiff did not belong, and he had no connection with the work of cooling the boiler, and was assured by the immediate superior officer, who had promised to see that the boiler was blown off at the proper time, that it was cool enough and ready to go into, and relying upon this assurance plaintiff entered the boiler and was injured because part of it was still hot, and it was held that he was entitled to recover. In *Eingartner v. Ill. S. Co., supra,* it was held that a carpenter gang whose duty it was to replace planks about a machine after their removal for the purpose of attaching new rolls are not fellow-servants of one employed to oil the machine, and their negligence in replacing the planks was the negligence of the employer. The court said at page 79:

"When a master undertakes to furnish the servant a place to work, with the preparation of which place the servant has nothing to do, then it is the master's duty to furnish a reasonably safe place to work, and this duty cannot be delegated; and the servant who prepares such safe place to work is not, in the eye of the law, a fellow-servant with the other."

It was held in *Cadden v. American S. B. Co.* 88 Wis. 409, 60 N. W. 800, that the plaintiff, a riveter, was not a fellow-servant with a gang of scaffold builders who prepared the scaffolding for him to work upon, and that the negligence of such scaffold builders was the negligence of the master.

In the instant case plaintiff had no connection with preparing the runway. He belonged to a different department of the work in the construction of the building, and when he was put to work in the trench he was entitled to a reasonably safe working place, and the master cannot escape liability by

showing that plaintiff's foreman was negligent in failing to make the place safe. The cases heretofore cited are ample on this proposition. This runway was not a mere detail of the work. It was very extensively used by men of the different departments during the construction of the basement of the building, and from the use to which it was put, as appears by the evidence, it would seem that it should have been quite a substantial structure.

2. Considerable argument is made upon the question of promise on the part of Williams to make the place safe by preventing use of it while plaintiff was at work in the trench, and it is contended by appellant that Williams had no authority to make such agreement; and further, that the evidence does not show a promise, and that if such promise were made with authority, as claimed by plaintiff, it would make the defendant an insurer. The question is argued on both sides upon the theory of the necessity of establishing that the promise by Williams bound the defendant. But the promise of Williams serves quite a different purpose. It being established that the place was unsafe, the only purpose of the promise was to relieve the plaintiff from the consequences of assumption of risk, which would defeat him had he continued to work without such promise, knowing the danger. The theory that a valid promise would make the defendant an insurer is without merit. The action is based upon the negligence of the defendant in failing to furnish a reasonably safe working place, and the charge of assumption of risk is met by proof of the promise. We think the evidence is sufficient to support the verdict upon this point. Williams was a superior servant over the plaintiff's crew. There is evidence that it was customary for foremen of the different departments to arrange prosecution of the work so as to protect the employees, and that Williams promised that the runway should not be used while plaintiff was at work in the trench. There is also evidence that Williams assumed the right to

make such arrangement and at least had apparent authority, and that plaintiff relied upon such promise and the authority of Williams, and had a right reasonably, under the facts of the case, so to do, and did not know that the runway was being used. Upon such evidence the jury would be entitled to find that plaintiff did not assume the risk. *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635; *Barney D. B. Co. v. Clark,* 112 Fed. 921; *Homestake M. Co. v. Fullerton,* 69 Fed. 923; *Dells L. Co. v. Erickson,* 80 Fed. 257.

3. It is further claimed by appellant that there is no sufficient finding of proximate cause, because the jury found two proximate causes, namely, unsafe place and negligence of Rasmussen, without finding specifically, as requested by defendant, whether the use of the runway was the proximate cause of plaintiff's injuries, and that the court should have submitted to the jury such question in order that it might be determined whether the use of the runway was the cause of the injurious result, and further that there is no evidence as to what caused the block to fall. The jury found two concurring proximate causes, namely, the defendant's failure to furnish a reasonably safe working place, and the negligent dropping of the block. We think the evidence is sufficient to support both of these findings, and it is apparent that the jury found that both acts of negligence contributed to produce the result. The defendant is chargeable with the consequences of both negligent acts, and the injury was the natural and probable result of their concurrence. So it is immaterial which of the two negligent acts was first in point of time. *Glettler v. Sheboygan L., P. & R. Co.* 130 Wis. 137, 109 N. W. 973; *McCoy v. Milwaukee St. R. Co.* 88 Wis. 56, 59 N. W. 453; *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535. If the place were unsafe and Rasmussen dropped the block because of the unsafe condition of the runway, the defendant would be chargeable with the result even though no

negligence were shown on the part of Rasmussen except in going over the runway with the block.

4. Error is assigned upon the admission of evidence respecting other instances of alleged danger in the work which plaintiff was ordered to do and objected to by plaintiff and remedied after such objection and before the work was done by him. This evidence, we think, was admissible for the purpose of showing or tending to show the custom of the foreman of one department or crew to arrange with foremen of other departments or crews so as to guard against dangers in the prosecution of the work, and for the purpose of showing that plaintiff was justified in relying upon the promise of Williams in regard to the nonuse of the runway; and perhaps, as suggested by the court below, it may have been admissible upon other grounds not necessary to consider here. The objection to this evidence was general, and under well established rules if the evidence was admissible for any purpose the objection was properly overruled, and, as we understand the record, counsel for defendant considered the evidence admissible for some purpose. Jones, Ev. (2d ed.) § 894 (897); *Coggswell v. Davis,* 65 Wis. 191, 202, 203, 26 N. W. 557; *State ex rel. Swenson v. Norton,* 46 Wis. 332, 337, 1 N. W. 22. The issues with regard to the refusal of plaintiff to work until the danger was removed and the promise on the part of Williams that the working place should be made safe, as well as the facts respecting the custom existing between foremen of the different departments or crews to make such arrangements when necessary for the safety of the employees in the prosecution of their work, were issues in the case under the pleadings, and the evidence complained of was directed to these issues.

5. Error is also assigned on refusal to submit by the special verdict certain questions requested and in failure to submit all the issuable facts in the case, and also in permitting improper argument to the jury by plaintiff's counsel. We find

no prejudicial error in this regard. The issuable facts were fairly submitted to the jury in the special verdict.

Respecting the argument of plaintiff's counsel to the jury, appellant complains of discussions of the evidence in regard to other dangers which by arrangement between Williams and other foremen on the job were remedied, which has been heretofore referred to. This evidence being competent, discussion of it was not error.

6. Error is assigned upon the instructions respecting accident. The court charged: "That which is an accident in the law is something that occurs which could not have happened had such reasonable care and caution as the law requires been exercised to prevent its occurrence." The court also charged that the burden of proof on the question of accident was upon defendant. These instructions were erroneous, and, we think, prejudicial, and must work a reversal of the judgment. Whether an accident occurred does not depend on the exercise of reasonable care, nor is it prevented by the exercise of reasonable care. The charge given would lead the jury to understand that whether there was in fact an accident depended upon whether or not the defendant was in the exercise of ordinary care. By this instruction the jury were not told that an accident is something which could not have been prevented by the exercise of ordinary care, but in effect were told that an accident cannot happen if reasonable care is exercised. So, by the instruction, whether or not there was an accident was made to depend upon whether reasonable care had been exercised to prevent it. In other words, the court by the instruction complained of instructed the jury that an accident cannot happen if reasonable care to prevent it has been exercised, or that negligence is an essential element of accident. Thus it appears that the instruction made the question of accident turn upon negligence. But it is insisted by counsel for respondent that the instruction was not prejudicial because the court had elsewhere in

the charge given a correct definition of accident. It is true that in the first part of the charge upon this subject the court correctly defined accident, but it afterwards so modified the first statement and in its last words erroneously defined it that we are of opinion that the error was not cured. In *Yerkes v. N. P. R. Co.* 112 Wis. 184, 191, 88 N. W. 33, this court said:

"It is well settled in this state that an erroneous instruction on a given subject is not cured by the fact that the law is correctly stated elsewhere; for it cannot be known whether the jury have been guided by the correct rule or by the erroneous one."

Moreover, the charge on burden of proof on accident was erroneous. The burden of proving negligence was upon the plaintiff. In order to entitle him to recover he was obliged to prove negligence, and in proving negligence the elements of accident are necessarily disproved. If in the proof of plaintiff's case it appeared that the injury resulted from an accident then no negligence was proved. Therefore to put the burden of proof of accident upon the defendant would in effect put upon it the burden of proving that it was free from negligence, which is not the law. Whether the injury was the result of an accident or resulted from the negligence of the defendant was a vital question in the case, and under the peculiar circumstances of the case it was of the utmost importance that the jury be properly instructed upon the question. The court is therefore of the opinion that reversible error was committed in the charge regarding accident, and for that reason the judgment must be reversed.

7. Error is assigned on the ground that the damages awarded by the jury are excessive. Upon this point the members of the court are not in accord, and since there must be a new trial we do not pass upon the question.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

The following opinion was filed January 23, 1911:

WINSLOW, C. J. I agree that under existing rules of law this judgment must be reversed. I cannot agree, however, with all that is said in the opinion of the court.

If I understand the opinion correctly, it holds by necessary implication that in building operations the master must furnish his employee a safe place to work. It seems to me that this is contrary to the doctrine which has been established and followed in this state, at least since the case of *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269. See, also, *Porter v. Silver Creek & M. C. Co.* 84 Wis. 418, 54 N. W. 1019, and the line of cases cited in *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429. The principle established in these cases is briefly that when a master furnishes suitable materials to his employees with which to erect a building upon a proper site he is not liable for injuries resulting to one of them from perils created by them in the progress of the work. The cases where, either by custom or contract, it is the duty of the master to furnish a scaffold upon which the employee is to work manifestly have no application to the present case. *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409.

As I view this case the law of safe place to work does not apply at all.

Again, I am not sure that I understand the position taken by the court as to the effect of the alleged promise by the gang foreman to make the place safe. Whether the opinion means that an objection of the employee and a promise to make safe by the gang foreman will serve to relieve the employee from assumption of the risk regardless of the fact whether the gang foreman had authority from the master to make the promise or not, I am unable to determine. If it does mean that, then it seems to me that it departs from well

established law. In order to have any effect upon assumption of risk the promise must be made by the employer or by one who is actually authorized to bind the employer or who has apparent authority to bind the employer and is believed by the employee to have such authority upon facts which would induce a reasonable man so to believe. 26 Cyc. 1208–1212. If this latter proposition is what the opinion means, then I do not disagree with it upon this point.

It gives me no pleasure to state these long established principles of the law of negligence. I have no fondness for them. If I were to consult my feelings alone I would far prefer to let the case pass in silence. No part of my labor on this bench has brought such heartweariness to me as that ever-increasing part devoted to the consideration of personal injury actions brought by employees against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of law which either deny relief entirely or necessitate a new trial make drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself.

If it be said that some of these rules are archaic and unfitted to modern industrial conditions I do not disagree; in fact that has been my own opinion for long. Upon reflection it seems that this could hardly be otherwise. Principles which were first laid down in the days of the small shop, few employees, and simple machinery could hardly be expected to apply with justice to the industrial conditions which now surround us. In those earlier days the laborer ordinarily knew his fellow-workmen, worked with simple machinery, and ran comparatively small risk of injury. The genius of our present remarkable industrial development requires that he carry on his patient toil in company with veritable armies of fellowmen, many of whom he can neither see nor know; it surrounds him with mighty and complicated machinery driven by forces

beyond his control, whose relentless strength rivals that of the thunderbolt itself; and it requires him to labor day by day with faculties at highest tension in places where death lurks in ambush at his elbow, awaiting only a moment's inadvertence before it strikes.

The faithful laborer is worthy of his hire in these latter days as never before; but is he not entitled to more, and are not those dependent upon his labors entitled to more? When he has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public for whom he wrought be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones? Shall these latter alone pay the fearful price of the luxuries and comforts which modern machinery brings within the reach of all?

These are burning and difficult questions with which the courts cannot deal, because their duty is to administer the law as it is, not to change it; but they are well within the province of the legislative arm of the government. Happily the legislature has seen the need and now has these questions under serious consideration. If it shall solve them justly and equitably within constitutional lines, or even make a substantial advance in the direction of such a solution, it will be entitled to the gratitude of all citizens. Confidently I can say that none will welcome such a solution more heartily than the judges of the courts.

I am authorized to state that Mr. Justice BARNES concurs in this opinion.

THOMAS, Respondent, vs. COLUMBIA PHONOGRAPH COMPANY, Appellant.

December 8, 1910—January 10, 1911.

Contracts: Construction: Questions for court: "Net profits:" Practical construction: Master and servant: Contract of employment: Commission on profits: Accord and satisfaction.

1. The construction of a written contract is for the court; as is also the question what interpretation the parties placed thereon by subsequent written communications.
2. The term "net profits" and the word "profits" ordinarily mean the same thing.
3. The term "net profits," when applied to a course of dealing including several successive transactions, involves the idea of time and, if unqualified by custom, usage, or other words in the contract, ordinarily refers to the termination of the adventure. It may, however, refer to the expiration of some fiscal period, less than and within the period of adventure, at the end of which profits are to be computed.
4. Where the whole period of adventure covers several fiscal periods designated for the purposes of computation, losses and gains arising out of matters covered by the earlier fiscal period but occurring after ascertainment of the profits for that period are carried into and increase or diminish the net profits in the next or some succeeding fiscal period. Anything included in the profits of any fiscal period during the adventure which afterwards turns out to be a loss goes to diminish the net profits of the next or some succeeding period.
5. Where a contract of employment entitled the employee to receive a commission of ten per cent. of the net profits up to $2,000 per month and thereafter on the basis of five per cent. of such profits, and computations were made monthly, net losses in one month should be deducted from net profits in others in computing the commissions. The fiscal period for computation of the net profits in such case is the month, but the real period to which the term "net profits" refers is the period of the employment.
6. Rendering and receiving monthly statements in which the net profits of one month were reduced by the losses in another month also places this interpretation on the contract.

7. Where a check or draft is sent by letter with a statement of account showing a balance due the person to whom the letter is sent equal to the amount of the check or draft, together with a statement that this is sent as settlement in full, the party receiving such letter cannot accept and retain the avails of the check or draft and at the same time deny that he received it in full settlement.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *Charles E. Monroe.* They cited, as to the practical construction of the contract by the parties: *Nilson v. Morse,* 52 Wis. 240, 253, 9 N. W. 1; *Janesville Cotton Mills v. Ford,* 82 Wis. 416, 430, 52 N. W. 764; *Jones v. Thomas,* 120 Wis. 274, 280, 97 N. W. 950; *District of Columbia v. Gallaher,* 124 U. S. 505, 510. As to the meaning of "net profits:" *Wallace v. Beebe,* 12 Allen (94 Mass.) 354, 357; *Welsh v. Canfield,* 60 Md. 469, 475; *Park v. Grant L. Works,* 40 N. J. Eq. 114, 121; *McCulsky v. Klosterman,* 20 Oreg. 108, 10 L. R. A. 785, 788. As to accord and satisfaction: *Nassoiy v. Tomlinson,* 148 N. Y. 326, 331; *Kercheval v. Doty,* 31 Wis. 476, 484; *Zimmer v. Becker,* 66 Wis. 527, 531, 29 N. W. 228; *Galusha v. Sherman,* 105 Wis. 263, 268, 269, 81 N. W. 495. As to direction of judgment for defendant: *Rosenberg v. McKinney,* 138 Wis. 381, 120 N. W. 230.

For the respondent there was a brief by *Paul D. Durant,* and oral argument by *H. F. Friedrich.* As to construction of the contract they cited: *Braun v. Wis. R. Co.* 92 Wis. 245, 66 N. W. 196; *Gibbons v. Grinsel,* 79 Wis. 365, 48 N. W. 255; and other cases. To the point that there was no accord and satisfaction: 1 Cyc. 312, 313; *Weidner v. Standard L. & Acc. Ins. Co.* 130 Wis. 10, 110 N. W. 246; *Otto v. Klauber,* 23 Wis. 471; *Lathrop v. Knapp,* 27 Wis. 214; *Lerdall v. Charter Oak L. Ins. Co.* 51 Wis. 426, 8 N. W. 280; *Continental Nat. Bank v. McGeoch,* 92 Wis. 286, 66 N. W. 606;

Herman v. Schlesinger, 114 Wis. 382, 90 N. W. 460; *Prairie Grove C. Mfg. Co. v. Luder,* 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085; *Canadian F. Co. v. McShane,* 80 Neb. 551, 114 N. W. 594.

TIMLIN, J. The parties hereto entered into a contract as follows:

"May 7, 1904. Confirming my personal interview of this date with you, you are hereby appointed manager of our Milwaukee office to take effect May 1st, 1904, at a salary of $25 per week, with a commission of one half (½) of one per cent. (1%) on the cash receipts of your office from sales, and ten per cent. (10%) of the net profits of the office up to a total profit of $2,000 per month; and thereafter on the basis of five per cent. (5%) of such profits; the profits in question to be determined at and by our executive office, and notice thereof to be duly sent you by such office as determined by them."

The plaintiff entered upon performance on May 1, 1904, and continued until early in the year 1908. His salary of $25 per week was regularly paid. Each month he sent a report to the executive office of the cash receipts during the month from sales at the Milwaukee office and received from the executive office a statement showing the receipts of the office, certain deductions therefrom, and the net profits for the month on which his commission was to be based. He claims that, selecting two months in which there were net profits and rejecting three months in which there were losses and not deducting worthless accounts, commissions are due and in arrears to the amount of $152.90, and for this sum he had verdict and judgment.

The construction of this contract was for the court. It is a contract of employment during the pleasure of either party, with three kinds of compensation: The wages which are fixed in rate measured by time; the percentage on cash receipts fixed in rate and easily measured by receipts; and the per-

centage on net profits fixed in rates but measured by net profits, which is a more uncertain base of computation. "Net profits" is a term often employed in contracts and business transactions and has quite a definite legal signification, and its meaning cannot be left to the varying judgments of different juries. Like other phrases, its meaning may be modified or affected by the context, by associated words, or by the subject matter of the contract. *Park v. Grant L. Works,* 40 N. J. Eq. 114; *Welsh v. Canfield,* 60 Md. 469; *Wallace v. Beebe,* 12 Allen (94 Mass.) 354.

Under exceptional circumstances showing an intended distinction there might be a difference in the meaning of the words "net profits" and that of the word "profits," but usually they mean the same thing. *Hentz v. Pennsylvania Co.* 134 Pa. St. 343; *Eyster v. Centennial Board,* 94 U. S. 500; *Hubbard v. Brainard,* 35 Conn. 563; *Jones v. Davidson,* 2 Sneed (34 Tenn.) 447. When the words "net profits" are applied to a course of dealing involving several successive transactions, the idea of time is inseparably involved in the expression. For receipts and disbursements, gains and losses, in such case are never simultaneous, and some period is always meant at the end of which net profits may be ascertained. The words "net profits," unqualified by custom, usage, or by other words in the contract, would naturally refer to the termination of the adventure. They may also refer to the expiration of a year or other fiscal period at the end of which profits are to be computed, but which is a fraction of and within the period of adventure. But in this latter case, if the business continues and covers several of such fiscal periods and the period is for the purpose of computation only and not for the purpose of terminating the adventure, losses and gains arising out of matters covered by an earlier fiscal period, but occurring after ascertainment of the profits for that period, are carried into and increase or diminish the net profits in the next or some succeeding fiscal period. It does not necessarily alter

this that the parties are at liberty at the end of any fiscal period to draw out the profits or a fraction of the profits thus computed, if the adventure is to continue. This is illustrated by the ordinary profit and loss account closed at the end of a fiscal year. Anything thereafter realized thereon goes to increase the net profits of the next or some succeeding year. Anything included in the profits of any fiscal period during the adventure which afterwards turned out to be a loss goes to diminish the net profits of the next or some succeeding year. The contract in the instant case contains a provision that when the net profits exceed $2,000 per month the rate of plaintiff's percentage thereof drops to five per centum upon the net profits in excess of $2,000, and this requires a monthly balancing of expenses and losses against receipts in order to ascertain the net profits for the month. This month is a mere fiscal period, not the end of the venture. The contract does not require that transactions still open upon which money is to become due shall be carried into that month. These transactions are postponed to and carried into the month during which payment is made thereon. It would be an entirely unreasonable construction of this contract to hold that during the period of service the plaintiff might select those months which showed a net profit, compute his percentage on this net profit, and reject all those months which showed a loss. The true construction of this contract is that the fiscal period for computation of net profits is the month, but that the real period to which net profits refers is the period of plaintiff's service; and if by reason of net profits made during some months and losses incurred during other months of the period of plaintiff's service there is at the end no net profit at all, the plaintiff has not earned anything by way of percentages upon net profits. And this is the construction which the parties themselves have put upon the contract as shown by competent evidence consisting of monthly statements rendered to the plaintiff and the statement of commission account from

May 1, 1905, to July 31, 1906, also that of March 5, 1907, in which the net profits of one month were offset against the losses of other months. The plaintiff acquiesced in this mode of computation. On October 10, 1907, the plaintiff transmitted to the defendant a statement of "absolutely uncollectible accounts receivable." There is some question raised as to the sufficiency of the identification of a list of such accounts produced. It is claimed that it has not been shown that this was the list contained in plaintiff's letter. However that may be, the defendant in its statement of March 17, 1908, in effect deducted these worthless accounts from assets in order to arrive at the net profits. We have no way to ascertain whether they were theretofore taken into consideration as assets or resources. If they were not, it was erroneous to deduct them. If they were, it was proper to deduct them as diminishing the net profits which accrued during the term of plaintiff's employment.

We are not obliged to rule on the sufficiency of the identification of these accounts. The defendant claimed the right to deduct these accounts and the monthly losses in arriving at the net profits upon which the plaintiff's commission should be based. The plaintiff refused to acquiesce in this view. While this condition existed and on March 9, 1908, the defendant forwarded to the plaintiff a statement of account covering the period from August 1, 1907, to December 15, 1907, deducting losses and payments theretofore made and showing a balance of $16.68 due the plaintiff. Inclosed with this was a check or draft for $16.68 and a statement that it was in full payment of the above account. The plaintiff accepted this check or draft, replying under date of April 6, 1908, showing he understood that the $16.68 was sent him as settlement in full. He returned the voucher unsigned but accepted the check. His reasons for so doing were, that he thought he would take what he could get, "simply hung on to what I could get." This brings the case within the rule of

Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715. The plaintiff could not accept the offer and avail himself of the funds without assenting to the condition upon which the offer was made.

On the whole case there was no question to go to the jury, no disputed issue of fact, merely the construction of the written contract and the effect of subsequent written statements upon the practical interpretation given to it by the parties. The plaintiff showed no right to recover on the evidence. *Hay v. Baraboo,* 127 Wis. 1, 105 N. W. 654.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

ARCHER, Respondent, vs. MILWAUKEE AUTO ENGINE & SUPPLY COMPANY, Appellant.

December 8, 1910—January 10, 1911.

Contracts: Breach of warranty: Measure of damages: Appeal: Bill of exceptions: Presumptions.

1. In an action for breach of warranty on a contract to furnish connections and accessories and install an engine in a boat, the measure of damages is the difference between the value of the boat in the condition in which it was delivered and what its value would have been had the contract been complied with, as well as such special damages as are properly shown.
2. An award of damages in such case "(a) for the difference in value between the connections, accessories and labor furnished, and that called for by the contract," and also "(b) for the expenses actually incurred by the plaintiff in putting the connections, accessories and installation work in the boat in a condition to correspond with the contract," is erroneous because involving duplication, the second item, so far as proper, being included in the first.
3. The second item above mentioned should in any case have covered only the expenses *reasonably* and *necessarily* incurred.

4. Where special damages have been awarded for breach of a contract it will be presumed on appeal, in the absence of any bill of exceptions, that if amendment was necessary the complaint was amended at the trial so as to permit recovery of such damages, and also, if evidence could show such damages to be proper, that such evidence was offered.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Modified and affirmed.*

For the appellant the cause was submitted on the brief of *Edgar L. Wood.*

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. B. Rubin.*

BARNES, J. The plaintiff was the owner of a boat and an engine. The defendant agreed to furnish the necessary connections and accessories and install the engine in the boat under a certain warranty as to material and workmanship, in consideration of $227.72. This action is brought to recover damages for breach of the warranty. The sixth question in the special verdict and the answers thereto were as follows:

"6. If the court should be of the opinion that the plaintiff is entitled to recover against the defendant in this action, what sum will reasonably compensate the plaintiff:

"(a) For the difference in value between the connections, accessories and labor furnished, and that called for by the contract?

"(b) For the expenses actually incurred by the plaintiff in putting the connections, accessories and installation work in the boat in a condition to correspond with the contract?

"(c) For the reasonable value of the use of the boat after the 15th of August, 1907, during the boat season of 1907?

"*Answer:* (a) 67.00 dollars.
(b) 96.00 dollars.
(c) 190.00 dollars.

353.00 dollars."

Judgment was entered on the verdict for $353 damages and costs. Defendant appeals. No bill of exceptions was settled. The question is, Does the verdict support the judgment?

The rule of law fixing the measure of damages recoverable is well settled. Plaintiff was entitled to recover the difference between the value of the boat in the condition in which it was delivered and what its value would have been had the contract been complied with, as well as such special damages as were properly shown. *Fisk v. Tank,* 12 Wis. 276, 309; *J. Thompson Mfg. Co. v. Gunderson,* 106 Wis. 449, 458, 82 N. W. 299. The first subdivision of the question called for every item of general damages which plaintiff was entitled to. The second subdivision was improperly submitted to the jury for two reasons: First, because the item of labor expense in putting the boat in the condition in which the defendant agreed to place it was covered by subdivision (a) of the question, and, second, because if it was desired to secure a second answer showing the damage suffered by plaintiff on account of bad workmanship, the question should have called for the amount *reasonably* and *necessarily* expended in making the repairs. The plaintiff might have incurred an unreasonable and unnecessary expense in doing the work. But such a finding would not assist in determining the damage sustained in the absence of another directed to the damage resulting from the poor material furnished. The first question is not confined to the materials used, but covers the labor cost of making the repairs as well. There is no escape from the conclusion that damages were duplicated, if it be conceded that the second question could have any proper place in the verdict.

The damages covered by subdivision (c) of the question are special, and it is urged that such damages are not recoverable under the complaint. In the absence of a bill of exceptions we must presume that the complaint was properly

amended, if amendment were necessary. *Kane v. Williams,* 99 Wis. 65, 74 N. W. 570. It is further urged that the special damages recovered were not fairly within the contemplation of the parties; that they were uncertain and speculative; and that the defects in the boat could readily have been remedied, and that plaintiff was obliged to minimize his damages by using reasonable diligence to repair the defects. We have no means of knowing whether these contentions are well founded in fact or not. If, under any proof that might have been offered, it could be said that the damages assessed were within the contemplation of the parties, we must presume that such evidence was offered, and it is not difficult to imagine a state of facts which would render such damages entirely proper. So, too, we are not able to say that these damages were not made definite and certain by the evidence, because we do not know what the evidence was. Neither can we say that facts were not shown which excused the plaintiff from making the repairs sooner than he did, or that it did not affirmatively appear that it was impossible to make them sooner. In order to review these questions it is essential that the evidence be made a part of the record.

Our conclusion is that the item of $96 should be stricken from the judgment as of the date of its entry, and that as so modified the judgment should be affirmed.

By the Court.—The judgment appealed from is modified by striking therefrom the sum of $96, as indicated in the opinion, and as so modified the judgment is affirmed; costs to be awarded to the appellant in this court.

KURATH, Administrator, Appellant, vs. GOVE AUTOMOBILE COMPANY, Respondent.

December 8, 1910—January 10, 1911.

Appeal: Undertaking dispensed with: Certifying questions: New trial: Motion for, when to be decided: Waiver: Orders nunc pro tunc: *Statutes construed.*

1. Where a certificate of the trial judge under sec. 3052m, Stats. (Laws of 1909, ch. 429), dispenses with the necessity of an undertaking on appeal, the appeal raises only such questions as would be raised by an appeal and undertaking in the usual manner. Said statute does not authorize the judge to certify questions to the supreme court.
2. In view of the power granted by sec. 2424, Stats. (Supp. 1906: Laws of 1905, ch. 6), to adjourn one term of court beyond the beginning of the next for any specific business to be named in the order of adjournment, the provision of sec. 2878, Stats. (Supp. 1906: Laws of 1901, ch. 100), that a motion for a new trial made upon the minutes of the court, if not decided during the same term, shall be taken as overruled, is not unreasonable as denying to the trial judge adequate time to consider and determine the matters involved, but is a valid enactment.
3. The parties may waive the provisions of said sec. 2878, and the judge can then decide the motion at any time; but no waiver can be inferred from the mere fact that no objection is made by either party at the time the motion is taken under advisement.
4. An order cannot be entered after the term, *nunc pro tunc* as of a day of the term at which the motion was made, since to permit that would be to render the statute nugatory.
5. To keep the motion alive under said sec. 2424, the judge must do so by special order at the close of the term; and he must dispose of it within the time fixed for the adjournment of the term, as the statute makes no provision for a second adjournment.
6. The provision of that portion of sec. 2424 relating to the second circuit, which declares that any trial, hearing, argument, or assessment commenced at one term but not concluded "shall be continued and proceeded with at the next term in the manner and with like effect as though it had been commenced at that term," relates to some proceeding in which the parties or their attorneys participate, and not to the mere taking under advisement of the decision of a hearing or argument already concluded by the parties.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Action for damages for death of a minor son of the plaintiff caused by the alleged negligent speed of an automobile driven by a man claimed to have been the servant of the defendant and acting within the scope of his employment at the time of the injury. The case was tried at the January term of court, and on March 25, 1910, the jury returned a special verdict and assessed plaintiff's damages in the sum of $1,750. Defendant moved upon the minutes of the judge to set aside the verdict and for a new trial, and on April 2d the motion was heard by the court and the decision thereon taken under advisement. The January term ended April 4th and the April term began on that day. May 21st the court rendered a decision setting aside the verdict and granting a new trial, and on the 27th of the same month a formal written order was signed, dated as of April 2, 1910, and filed. Plaintiff appealed, and the trial judge, pursuant to ch. 429, Laws of 1909 (sec. 3052*m*, Stats.), certified that the undertaking required by sec. 3052, Stats. (1898), need not be given, owing to the inability of plaintiff to furnish the same. He also certified a question to this court for answer.

Charles E. Hammersley, for the appellant.

For the respondent there was a brief by *Carroll & Carroll,* and oral argument by *G. E. Carroll.*

VINJE, J. In view of the practice adopted by the trial court in this case in certifying a question to this court for answer, presumably pursuant to ch. 429, Laws of 1909 (sec. 3052*m*, Stats.), it seems advisable to indicate the purpose of that act. The section provides that:

"The bond required by sec. 3044 of the statutes on the issuance of a writ of error and the undertaking required by sec. 3052 of the statutes on an appeal shall not be required if the judge before whom the action or proceeding was tried

shall certify that the cause or proceeding necessarily involves the decision of some question of law of such doubt and difficulty as to require a decision of the same by the supreme court, or that it necessarily involves the construction or interpretation of some provision of the constitution of the United States or of the constitution of this state, or that the party desiring the writ of error or the taking of an appeal is unable to furnish such bond or undertaking; provided, however, that such certificate shall not be made except upon notice to the parties interested. Such certificate shall be filed with the clerk of the court and be returned with the record in the case to the supreme court with the writ of error or appeal."

It is apparent from a mere reading of the act that it dispenses with the necessity of furnishing the bond required by sec. 3044, Stats. (1898), in case of a writ of error or of the undertaking required by sec. 3052 in case of an appeal, if the trial judge shall certify (1) that the cause or proceeding necessarily involves the decision of some question of law of such doubt and difficulty as to require a decision of the same by the supreme court; or (2) that it necessarily involves the construction or interpretation of some provision of the constitution of the United States, or (3) of the constitution of this state; or (4) that the party desiring the writ of error or the taking of an appeal is unable to furnish such bond or undertaking. In this case the trial judge certified that the appellant was unable to furnish the undertaking, and such certificate dispensed with the necessity of giving an undertaking, and the appeal so taken raised such questions only as would be raised by an appeal and undertaking in the usual manner. The statute referred to does not authorize the trial judge to certify a question to this court, and therefore the question certified cannot be answered.

Plaintiff contends that we cannot consider the appeal upon the merits because the trial court had no jurisdiction to decide the motion for a new trial made upon the minutes of the judge after the expiration of the term at which the cause was tried and the motion made. This contention is based upon

sec. 2878, Stats. (1898), as amended by ch. 100, Laws of 1901, which provides:

"The judge before whom the issue is tried may, in his discretion, entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions or because the verdict is contrary to law or contrary to evidence, or for excessive or inadequate damages; but such motion if heard upon the minutes can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the judge and an appeal is taken from the decision, a bill of exceptions must be settled in the usual form, upon which the argument of the appeal must be had. If such motion be made, but not decided during such term, it shall be taken as overruled, and an exception to such constructive denial of the same shall be allowed in the bill of exceptions."

This enactment was evidently intended to prevent unreasonable delay in the decision of such motions and secure to litigants a reasonably speedy determination thereof. *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664. That serious abuses in this respect existed must be assumed, or else the legislature would not have been called upon to act in the matter. Its power to prescribe reasonable rules and regulations for the final disposition of business pending in trial courts cannot be questioned. It might be argued, however, were this the only statute affecting the subject, that a rule requiring a trial judge to decide such a motion during the term, even when it is made during the last hour thereof, as it may be, is not a reasonable rule, in that it may not in such a case give the trial judge adequate time in which to consider and determine the matters involved. But in sec. 2424, Stats. (1898), as amended by ch. 6, Laws of 1905, the legislature has provided an easy and ample remedy for such situations. That section provides: "One term may be adjourned beyond the beginning of the next term in the same county for such specific business as is named in the order of adjournment." This enables a judge who may have business to dispose of that

he cannot finish during the term to adjourn the term to any reasonable time in the future beyond the beginning of the next term by merely making an order to that effect, specifying therein the business so held over for future disposition. In view of this statutory provision it is deemed that sec. 2878 as amended, requiring such motions to be decided during the term or else they shall be taken as overruled, is a valid enactment and does not unreasonably interfere with the disposition of matters in court. It is, moreover, within the power of the parties to waive the provisions of the section, and the judge can then decide the motion at any time. *Hinton v. Coleman,* 76 Wis. 221, 45 N. W. 26; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123, 65 N. W. 852; *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664. But no waiver can be inferred from the mere fact that no protest is made by either party at the time the motion is taken under advisement. Whether it shall be decided at once or taken under advisement is a matter entirely within the discretion of the trial judge. The parties have no voice therein.

The defendant claims that, inasmuch as the order was dated April 2d, it must be considered as made during the term the cause was tried and the motion made, and he argues that sec. 2878 as amended cannot be construed to take away from courts the power to enter *nunc pro tunc* orders. It is not necessary to decide the question as to what restrictions, generally speaking, the legislature may lawfully impose upon courts in the granting of *nunc pro tunc* orders, for it is obvious that if trial courts could lawfully decide such motions as the one in question at any time, then simply enter a *nunc pro tunc* order as of a day of the term at which the motion was made, the statute would be nugatory. The decision of the court upon the motion must, unless waived by the parties, be made during the term the case was tried or else jurisdiction to decide is lost. *Prentiss v. Danaher,* 20 Wis. 311; *Gans v. Harmison,* 44 Wis. 323. It may be said that the

provisions of sec. 2424 as amended (ch. 6, Laws of 1905) enable a judge to prolong the time within which he can lawfully act upon such a motion. That is true; but at the end of the term, in order to keep the motion alive, the fact that it has not been decided must be called to the attention of the judge and he must keep it alive by a special order, and is therefore more likely to dispose of it within a reasonable time. Indeed, he must dispose of it within the time fixed by him for the adjournment of the term, as the statute makes no provision for a second adjournment.

In that portion of sec. 2424, Stats. (1898), relating to the Second circuit, from which this appeal is taken, is found this provision:

"Any trial, hearing, argument or assessment which shall have been commenced during any term, but shall not have been concluded before the commencement of the next term, shall be continued and proceeded with at said next term in the manner and with like effect as though it had been commenced at that term."

It may be claimed that this provision saves the motion and that it does not, pursuant to sec. 2878 as amended (ch. 100, Laws of 1901), stand overruled at the expiration of the term. But we are of the opinion that this provision relates to a proceeding in which the parties or their attorneys participate, and not to the mere taking under advisement by the judge of the decision of a hearing or argument already concluded by the parties.

It follows that the trial court, having allowed the term to lapse without a continuance, had no jurisdiction to decide the motion on May 21st, when, the record shows, the decision was made, and that it must, by force of sec. 2878 as amended, be deemed to have been overruled. This result precludes a consideration of the case upon the merits.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

WAGNER, Appellant, vs. ENGEL-MILLAR COMPANY, Respondent.

December 8, 1910—January 10, 1911.

Gaming contracts: Transactions on board of trade: Brokers: Intent to deliver: Evidence: Questions for jury.

1. Where a broker executes on a board of trade a client's order to buy grain for future delivery the transaction is valid under sec. 2319*a*, Stats. (1898), if either of them intends in good faith that the contract of purchase shall be performed by delivery of the grain or of warehouse receipts therefor; and if in such a case, before the time for delivery, the broker sells the grain by order of his client and at a loss, he may recover the amount of such loss from the client.
2. The question whether there was a good-faith intent of either party that there should be actual delivery of the grain is not settled by the statements of the parties themselves, but, in addition thereto, all the facts and circumstances throwing light on the intent are to be considered. The facts that the transaction is a board of trade transaction and upon a margin are not conclusive against such intent.
3. There being in this case direct and positive evidence of an intent on the part of the broker that there should be actual delivery, and the existence of such intent not being incredible or against all the reasonable probabilities and the overwhelming weight of the evidence, the question was for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action to recover $618.75 alleged to have been expended by the plaintiff in the purchase of corn on the board of trade in Chicago at the request of the defendant. The defense was in substance that the transaction in question was a gambling transaction and not an actual purchase of corn. The jury returned the following special verdict:

"(1) Did both parties to this transaction, plaintiff and defendant, intend when entering into it that it should be settled by the payment of difference in the price of corn according to the rise and fall of the market? *A.* No.

"(2) If you answer the foregoing question 'No,' then answer this question; otherwise you need not answer this question: Did the plaintiff intend, when entering into this transaction with the defendant, to make a delivery of corn under the contract? *A.* Yes."

Upon motion the trial court changed the answer to the first question from "No" to "Yes," struck out the answer to the second question, and rendered judgment for the defendant, from which the plaintiff appeals.

For the appellant there was a brief by *Burke, Alexander & Burke,* and oral argument by *W. E. Burke.*

Ernest A. Kehr, for the respondent.

WINSLOW, C. J. The plaintiff was a grain broker on the Chicago board of trade, the defendant a domestic business corporation located at Milwaukee. October 18, 1907, the defendant corporation telegraphed to the plaintiff an order to buy 10,000 bushels of May corn at 61⅛ cents, and on October 21st following an order to buy another 10,000 bushels of May corn at 61½ cents. Both orders were immediately executed on the Chicago board of trade; that is, one of *Mr. Wagner's* employees went into the grain pit and found a seller and "contracted for the purchase" of 10,000 bushels of corn for delivery in the following May under the rules of the board of trade, the trades being noted on cards which each broker carried for the purpose. October 29th following the defendant telegraphed the plaintiff to sell the corn previously purchased, and the plaintiff sold 20,000 bushels of May corn on the board of trade in the same manner at 58¼ cents per bushel, entailing a loss of $637.50, for which loss (less a credit of $18.75) this action is brought.

Both *Mr. Wagner* and his manager testified that, while the purchases were margin transactions, there was an actual intent to deliver the corn purchased in each case; that deliveries were expected to be made by warehouse receipts representing corn actually stored in elevators; that had the selling

order not been received, warehouse certificates for the 20,000 bushels would have been delivered in May, but on account of the order to sell there was no actual delivery. The defendant's manager, Mr. Millar, testified that he had no idea that any corn would be delivered, but that he supposed it to be a mere bet on future prices to be settled by payment of differences.

The question, of course, was whether these board of trade transactions were valid transactions or mere gambling contracts, and this depends upon the intention of the parties. If both parties, *i. e. Mr. Wagner* and Mr. Millar, intended no actual delivery, but merely a wagering contract to be settled by the payment of differences, then the whole transaction was a gambling contract and void and there can be no recovery here. If, on the other hand, either *Mr. Wagner* or Mr. Millar intended in good faith that the contracts of purchase should be performed by delivery of the corn or warehouse receipts therefor (which is the equivalent thereof), the transaction was a valid one and the plaintiff is entitled to recover. This is very well established by the statute (sec. 2319*a*, Stats. 1898) and by the decisions thereunder cited and reviewed in *Carson v. Milwaukee P. Co.* 133 Wis. 85, 113 N. W. 393.

The question whether there was such good-faith intent on the part of either party is not settled by the statement of the parties themselves, although such evidence is to be considered, but all the facts and circumstances throwing light on the intent are to be considered. The fact that the transactions were margin transactions, and the further fact that they were board of trade transactions, are entitled to be considered, because of the well known fact that very many, if not a large majority, of such transactions are wagering transactions entered into with no intent to deliver the actual grain, but only to settle by the payment of differences. Nevertheless these facts are not conclusive. The intent to make actual delivery may exist in such transactions.

There was direct and very positive evidence that it did exist on the part of *Mr. Wagner* in the transaction under investigation here; and we cannot say that it is incredible or that all the reasonable probabilities and the overwhelming weight of the evidence are against the existence of such an intent. Hence the question was for the jury. *Bannon v. Ins. Co. of N. A.* 115 Wis. 250, 91 N. W. 666.

The question was submitted to the jury without error, and the jury found the existence of the intent to make actual delivery on the part of the plaintiff. There being sufficient evidence to go to the jury upon that question, judgment for the plaintiff should have been entered on the verdict.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment on the verdict for the plaintiff in accordance with the prayer of the complaint.

PERN, Appellant, vs. WUSSOW, Respondent.

December 9, 1910—January 10, 1911.

Master and servant: Unsafe working place: Warning of recurring dangers: Rules, when necessary.

1. Where there are many fellow-servants, some working in one department or feature of an industry and some in others quite independent thereof, and the situation is such that the work in one department is likely from time to time to create peril of personal injury to those engaged in some other part of the work unless precautions according to some prescribed method are exercised to avoid it, ordinary care requires the making and efficient promulgation of reasonably sufficient rules to that end.
2. But where there is a single small crew of men working with each other at a single task, and one of them is injured by reason of a danger incident to constantly changing conditions created by the men themselves, which all appreciate and understand they are expected to avoid by individual vigilance, the foregoing rule and the general rule respecting the duty of the master to furnish a safe working place have no application.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The complaint is to this effect: January 29, 1908, plaintiff, with others, was working for defendant in cutting down and carrying away a bank of earth which was about ten feet high. The cutting down and, in the main, loading on wagon, was accomplished by use of a steam shovel, managed by several employees. The surface was frozen to a depth of about six inches. Plaintiff and a few associates worked at the foot of the embankment, while others worked at the top, cracking the frozen earth so the shovel would take it. Sometimes pieces of frozen earth would become wholly loosened by the shovel, but would not be taken into it. Such pieces would fall down where the employees were below, thus rendering their place dangerous. Other frozen pieces would, at times, drop from the shovel. Plaintiff's task led him to give such attention thereto, that often he was so located as to render it difficult to observe falling pieces of frozen earth, unless attention was called thereto by some one warning him. Customarily some employee gave warning of the imminence of such danger upon its occurring. No rules were promulgated in respect thereto, though such were necessary for the safety of employees circumstanced as plaintiff was. By reason of neglect in that regard, plaintiff was struck by one of the frozen pieces of earth, severely fracturing his right leg. Issues were joined by answer.

The evidence was to this effect: The situation of the plaintiff's working place and the dangers to which he was subjected were substantially as alleged. Employees were stationed on the bank to crack the crust by use of wedges and hammers. Plaintiff was familiar with all the details of the work. He knew it was dangerous to get in the way of falling lumps of earth. He had been warned in that regard, and all circumstanced as he was, knew that they had to be alert in regard to danger from falling pieces of earth and stones. Before he

was injured he knew of many pieces coming down. Generally, some one gave warning; sometimes one employee did and sometimes another, but not by rule. In the particular instance no warning was given. Plaintiff did not know of the imminence of danger till he was struck. He knew that men were breaking up the frozen crust at the top of the bank. He knew that if a piece of dirt struck him it would be liable to inflict an injury. He knew that it was a common occurrence for pieces to roll down; also that pieces had rolled down without any one giving warning. He had given warning when he observed a piece of earth liable to endanger any one, and had always received warning from some one whenever in like danger, prior to his injury.

On the case thus made the court granted defendant's request for a nonsuit. Judgment was rendered dismissing the action with costs.

For the appellant there was a brief by *Burke, Alexander & Burke,* and oral argument by *W. E. Burke.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

MARSHALL, J. The rule is invoked that, where there are many fellow-servants, some working in one department or feature of an industry, and some in others quite independent thereof, and the situation is such that the operation in one department is quite likely, from time to time, to create peril of personal injury to operators in some other part of the work, unless precautions according to some prescribed method are exercised to avoid it; ordinary care requires making and efficient promulgation of reasonably sufficient rules to that end. Counsel pin their faith to that, seemingly conceding that aside therefrom the judgment is right.

The doctrine suggested was formulated into a reasonably definite rule in *Polaski v. Pittsburgh C. D. Co.* 134 Wis. 259, 114 N. W. 437, as a logical deduction from many previous

adjudications in this and other courts. *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, 63 N. W. 90; *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 77 N. W. 875. It was subsequently applied to a situation definitely satisfying the particular calls thereof in *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502.

The statement of significant circumstances requisite to create the duty aforesaid, it seems, is sufficient to show, plainly, that it has no application to this case. Here, there were but a few employees, all working, substantially, together. The activities of the entire crew were confined within quite a narrow compass. All were in sight and hearing of each other, with only a few steps from one extreme to the other of the operations. There was but one crew, and quite a small one, working at the single task of transferring the bank of earth to wagons, appellant being a handyman on the lower level, part of his work being to shovel the pieces of frozen earth and stones, which the shovel did not take, into the wagons. There were no independent tasks, as in the *Promer Case,* where a car repairer was, from time to time, liable to be interfered with by the moving of cars by a switching crew, and the *Polaski Case,* where members of a loading crew were required, from time to time, to leave their working places at one track and cross parallel tracks upon which cars were frequently moved. Such independent task of moving cars would naturally imperil the personal safety of those engaged in the other task. The advisability of special rules under such circumstances is plain. The situation in hand was not similar. It was more like that of a car-repair crew by itself, some working at one part of the car and some at another; some repairing one car and some another in the same vicinity.

The trial court ruled in harmony with the foregoing. Plaintiff seems to have been injured because of a danger with which he was perfectly familiar and which he voluntarily subjected himself to, a peril incident to constantly changing

conditions created by him and his associates, which all appreciated and understood they were expected to avoid by individual vigilance. The law applicable thereto is plain, as many times illustrated in our decisions. The rule that the master must furnish his servant a reasonably safe place to work and use ordinary care to keep it constantly so, does not apply. *Larsson v. McClure,* 95 Wis. 533, 539, 70 N. W. 662; *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27, 71 N. W. 814; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22; *Nix v. C. Reiss C. Co.* 114 Wis. 493, 504, 90 N. W. 437. The court properly directed a verdict for defendant.

By the Court.—Judgment affirmed.

GREENE, Appellant, vs. CURTIS AUTOMOBILE COMPANY, Respondent.

December 9, 1910—January 10, 1911.

Sales: Automobiles: Warranty: Breach: Rescission: Waiver.

1. Representations by the seller of a second-hand automobile that it was in a good state of repair and efficiency and would develop eighteen horse power and operate all right, made to a buyer who was unfamiliar with the mechanism of automobiles and so informed the seller, were relied upon by the buyer and were understood by both parties as conditions upon which the car was purchased. *Held,* that they became a part of the contract of sale, and failure of the car to conform thereto warranted a rescission by the buyer.
2. The buyer's right to rescind the sale in such case was not waived by his accepting from the seller a written memorandum stating in detail the repairs which the seller proposed to make and adding, "if the above repairs do not make car right will dispose of the same," where it appears that the giving of such writing was but a step in a continued attempt of the seller to put the car in proper condition and that, notwithstanding such repairs, the car still failed to conform to the contract.
3. After rescission by the buyer, no act of the seller in rebuilding the car or any of its parts to make it conform to the conditions of the sale would bind the buyer.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

On July 30, 1906, *Alvin H. Greene,* on behalf of his wife, *Bertha Greene,* agreed to purchase from the defendant company a second-hand Autocar for $900. Seven hundred dollars was paid in cash when the car was turned over to *Mr. Greene.* There is a controversy as to the terms upon which a second-hand car belonging to the plaintiff was received by the defendant, but for the purposes of this appeal the finding of the trial court that the car was taken at a valuation of $200 for the balance of the purchase price of the Autocar is not questioned. *Mr. Greene* was told by the representative of the defendant company that the Autocar would develop eighteen horse power and that it was in good condition. *Mr. Greene,* in reliance upon the representations of the defendant's representative, closed the deal for the purchase of the Autocar. He was unfamiliar with the mechanism and construction of automobiles and went with the representative of the defendant a number of times out in the Autocar to learn how to run it. The car did not operate satisfactorily on these trips or on several trips which *Mr. Greene* attempted to make during the first half of the month of August and also during some trips which were attempted during the latter part of the month by Mr. Ure, a driver for *Mr. Greene.* After each of the unsuccessful attempts to operate the car it was taken to the garage of the defendant company and the representative promised each time to put the machine in a satisfactory condition. *Mr. Greene* was absent from Milwaukee for a while, but returned in the last days of the month of August and attempted to use the car. It would not operate satisfactorily. It would run only on low gear, despite the assurance of the representative of the company that the car was all right, which was made when the car was about to be taken out; and *Mr. Greene* tendered the car back to the company and demanded a return of the purchase price.

On September 1, 1906, the representative of the defendant gave *Mr. Greene* a written statement of what he would do to make the car satisfactory. This statement is as follows:

"*Mr. A. H. Greene:* Milwaukee, 9–1, 1906.

"We agree to make the following repairs to Autocar, guaranteeing to increase the horse power to about 18, namely:

"Put in 12 new piston rings.

"Put on new commutator.

"Repair storage battery.

"Take up lost motion in valve stems with case-hardened nuts.

"Grind valves.

"Revise entire ignition system.

"Put in new sliding gear for transmission to be paid for by *Mr. Greene.*

"If the above repairs do not make car right, will dispose of same. CURTIS AUTO CO.

"Per A. J. March."

A few days later when *Mr. Greene* wished to try the car he was assured, "The car is all right, it will give good satisfaction." The car proved unsatisfactory upon this trial. It was taken back to the garage and the representative of the defendant agreed to go over it again and put it in shape and to telephone *Mr. Greene* when it was ready. A few days later, when *Mr. Greene* received a telephone that the car was all right, he and *Mrs. Greene* went to the garage to try it. In going from the garage to the street a bolt dropped from the car, a tooth on the gear wheel was broken, and *Mr.* and *Mrs. Greene* left the car, stating that they would not take the car and demanding the return of the purchase price. Two days thereafter *Mr. Greene* wrote the following letter to the defendant:

"Milwaukee, Wis., Sept. 17, 1906.

"*Curtis Automobile Company,*

"Milwaukee, Wis.

"DEAR SIRS: On July 30th you sold my wife, through me, a four cylinder automobile known as the 'Autocar.' Being ignorant of the construction of automobiles, we took your

word for the condition of the car, and as you are well aware and as you have admitted, the car has not given satisfaction and was not in the condition in which you represented it to be.

"Rather than have any trouble in this matter we preferred to give you all the time possible in order to make a satisfactory running machine, and on the 1st of September went over the matter with you in detail, and you figured that certain repairs would place the machine in a satisfactory condition. After spending approximately two weeks at this work, it is not necessary for me to call your attention to the fact that the machine is as far from being satisfactory as it has been since the writer's acquaintance with it, and we do not feel at this time that we can lend any further indulgence in the matter and therefore request that you send us a check payable to *Mrs. A. H. Greene* for $900 in full settlement of this transaction.

"We expect to hear from you, together with a remittance for the above specified amount, by return mail.

"Yours truly, A. H. GREENE."

During the latter part of September the car was put in satisfactory condition by the defendant company. No notice was given *Mr. Greene* of this fact.

Shortly after action was commenced by *Mrs. Greene* to recover the purchase price of the car, action was begun by the defendant company to recover for the repairs made on the car and for storage charges. The two actions were consolidated.

The trial court found that the agreement of September 1, 1906, was an acceptance of the car and a waiver of the fraudulent breach of the contract of sale that the car was a good one, that it would develop eighteen horse power, that the parts were in a perfect operating condition and would run all right, when in fact the car was not a good one, its parts were out of repair and defective so that it would not develop eighteen horse power as represented; nor would it run all right.

This is an appeal from the judgment of the trial court dismissing the complaint of *Mrs. Greene* and awarding judg-

ment to the automobile company for the repairs and for storage charges.

For the appellant there was a brief by *Burke, Alexander & Burke,* and oral argument by *W. E. Burke.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *W. F. Adams.*

SIEBECKER, J. The court found that *Mr. Greene* acted for the plaintiff *Mrs. Greene* in all of the transactions involved in the purchase of the automobile from the defendant company. Plaintiff contends that her agent had no authority to deal with the defendant's officers as he did in negotiating with them for repairs on the automobile, as specified in the written memorandum of September 1, 1906. The evidence in the case justifies the inference that he acted within the scope of his authority on this occasion and that his acts pertaining to such arrangements were authorized by and within the scope of his employment by the plaintiff.

The question then arises, Did the referee and court err, as claimed by the plaintiff, in holding that the acceptance by *Mr. Greene* of the defendant's offer to make the repairs on the automobile upon the terms expressed in the writing of September 1, 1906, constituted a waiver of any default by the company in furnishing an automobile that was not in as good a condition of repair and as capable of developing horse power as agreed in their contract of sale? The court approved the findings of the referee, which were to the effect that the defendant represented to the agent of the plaintiff and stipulated that this car was in a good state of repair and efficiency and would develop eighteen horse power and that it would operate all right so as to be fit for the ordinary uses and purposes of an automobile. These findings are challenged by the respondent. The evidence satisfactorily shows that the representations were made and were understood by the parties as conditions upon which the car was purchased by the plaintiff.

It appears that the agent, *Mr. Greene,* was unfamiliar with the mechanism of a machine and so informed the defendant's representative with whom he negotiated for its purchase, and that he relied upon such representations respecting the condition, power, and fitness of the car. Under these circumstances such representations do not constitute mere expressions of opinions concerning the car and its uses, but were representations of facts pertaining to its character, condition, and usefulness, on which the plaintiff's agent had a right to rely as a condition in making the purchase. They therefore became integral parts of the contract of sale. There is no serious dispute in the evidence but that the machine was defective in its mechanical parts and their operation and that it failed to develop the horse power called for by the contract of sale. The evidence is clear that the defendant's representative so considered it. This is clearly shown by the repeated attempts to repair the defects and by the attempts of the representatives to put it in such condition as to make it conform to the representations made by them. The finding that the car did not comply with the representations made to *Mr. Greene* is abundantly established by the evidence and furnished a good and sufficient basis for plaintiff to rescind the agreement.

The main question therefore is, Did the trial court err in holding that the transaction between the parties, culminating in the writing of September 1, 1906, amounted to an agreement by which the plaintiff's agent waived the fraudulent representation as to its repair and the condition of the machine and the consequent breaches of the contract of sale, and that the plaintiff was thus deprived of the right to rescind the contract, as she claims to have done the last time she and *Mr. Greene* attempted to use the car, and by the letter of September 17, 1906. It is undisputed that *Mr. Greene* had knowledge of the defects in the machine prior to September 1st, when he and the defendant's agent arranged for the

repairs specified in the writing of this date. The trial court considered that in view of the circumstances under which this arrangement was made it showed an intention to waive the right to rescind the sale for breach of the conditions of the agreement of purchase and to accept the machine.

In the light of the accompanying circumstances we are persuaded that the court erred in this regard. The foregoing statement of the evidence, as embodied in the referee's findings, clearly tends to show that the agent, *Mr. Greene,* persistently declared to the defendant's representatives that the machine must be put in as good a condition as called for by the contract of purchase and that he insisted on the right to return the machine unless it should be put in such condition. Defendant's representatives on the various occasions up to September 1, 1906, when the complaints concerning the defects in the car were brought to their attention, promised to repair it and remedy the defects complained of. In the negotiations leading up to the memorandum of September 1, 1906, they were explicitly notified that the plaintiff refused to accept the car in its imperfect condition, and the defendant thereupon offered by this writing to make the repairs specified therein. It does not appear that the parties in this writing agreed that the plaintiff was thereby accepting the car as of that time and that she was waiving defendant's defaults if it finally failed to make good the imperfect condition of the car, as required by the original contract of sale.

It is claimed that the provision, "If the above repairs do not make car right, will dispose of same," shows that if the specified repairs did not remedy the defects, then it was to be disposed of as plaintiff's property by the defendant for her. Wherein does this show that such disposition of the car was to be for the plaintiff? It is not so written, and to so interpret this provision violates its evident intent, for it significantly provides, "If such repairs do not make car right," then it is to be disposed of by the defendant. Obviously, such de-

fault referred to the original conditions of purchase, which defendant was attempting to "make right" by these repairs. Furthermore, all the surrounding facts and circumstances confirm the inference that the negotiation of September 1, 1906, was only one step in the course of dealing between the parties to put the car in condition to comply with the contract of sale. The transactions of which the writing of September 1st form a part clearly show such a purpose and negative the claim that the plaintiff thereby agreed to accept the machine and stipulated for these repairs in addition to the conditions of purchase.

The evidence is conclusive that the car did not fulfil the conditions of the contract of sale when first delivered, and that at no time was it put in proper condition up to the time of the last trial in September when plaintiff and her agent declared the contract rescinded and demanded repayment of the purchase money. It is shown that the plaintiff had given the defendant ample opportunity to repair the defects and put the car in proper condition to comply with the contract of sale, that it failed to do so, and that she was entitled to rescind the sale at the time she last tried the car in September and when the letter of September 17, 1906, was sent to the defendant. After such rescission no act of the defendant in rebuilding the car or any of its parts to make it conform to the conditions of the sale could be effective to bind the plaintiff. The plaintiff was entitled to judgment for recovery of the purchase money.

By the Court.—The judgment is reversed, and the cause remanded with directions to award the plaintiff judgment for the purchase price paid for the automobile, with interest.

W. H. PIPKORN COMPANY, Respondent, vs. EVANGELICAL LUTHERAN ST. JACOBI SOCIETY OF THE CITY OF MILWAUKEE, Appellant, and others, imp., Respondents.

December 8, 1910—January 10, 1911.

Liens: Subcontractors: Application of payments: Notice and claim: Sufficiency: Amount due: Misnomer of owner: Appeal: Findings.

1. The general rule that, where a debtor makes a voluntary payment to a creditor who has several claims against him and fails to direct where such payment shall be applied, the creditor has a right to apply the same on any of the claims, governs a payment made by a contractor to a materialman who had furnished materials to him on several different jobs, as against a property owner from whom the contractor had received the money so paid.
2. A notice of subcontractor's lien sufficiently complies with sec. 3315, Stats. (1898), in respect to stating the *amount due* where it states the total amount of the bill and the amount paid thereon, the balance due being necessarily inferable from the facts stated. *Chandler L. Co. v. Fehlau*, 137 Wis. 204, distinguished.
3. A notice of subcontractor's lien directed to "St. Jacobi Congregation," etc., but properly served upon the real owner, "Evangelical Lutheran St. Jacobi Society," etc., is sufficient, the statute (sec. 3315, Stats. 1898) not requiring that the notice be *directed* to the owner, but merely that it shall be *given* to the owner and shall contain certain particulars.
4. Where the complaint of a subcontractor alleges that a claim for a lien was duly filed which contained the name of the person against whom the demand was claimed, a finding of that fact by the trial court will not be disturbed on appeal where the record shows that the claim for lien filed in the clerk's office was received in evidence without objection and the certificate to the bill of exceptions shows the loss of some of the exhibits, although the owner's name was not correctly given in the copy of the claim annexed to the complaint and it does not appear that any amendment was asked for or allowed.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff, a furnisher of

building materials, to foreclose a mechanic's lien upon the property of defendant *Evangelical Lutheran St. Jacobi Society of the City of Milwaukee.* The contractor, William Stoll, and also the *United States Gypsum Company, Herman Mettelmann,* and *Maxwell, Forbes & Stillman Company,* who furnished materials, were impleaded as defendants. The court awarded judgment in favor of the plaintiff and against the contractor, William Stoll, for the amount found due, also gave judgment against said William Stoll, contractor, for the amount found due the other impleaded defendants respectively, and awarded a lien upon the property of defendant for the several amounts and judgment of foreclosure and sale of the property according to the statute. The defendant *Evangelical Lutheran St. Jacobi Society* appealed.

For the appellant the cause was submitted on the brief of *Lorenz & Lorenz.*

For the respondent *W. H. Pipkorn Company* there was a brief by *James T. Drought;* for the respondent *Mettelmann* a brief by *Reukema & Lemke;* for the respondent *Maxwell, Forbes & Stillman Company* a brief by *Miller, Mack & Fairchild;* for the respondent *United States Gypsum Company* a brief by *Winkler, Flanders, Bottum & Fawsett;* and the cause was argued orally by *Mr. Drought, Mr. W. F. Adams,* and *Mr. Charles E. Wild.*

KERWIN, J. The findings of fact below are attacked on this appeal. The plaintiff was a furnisher of building materials and the defendant Stoll a contractor, and at the time he purchased the materials from the plaintiff which went into the building of the appellant he had seven jobs on hand besides the appellant's for which he bought materials from the plaintiff.

The eighth finding of fact, which among other things finds the amount due the plaintiff, is attacked as not being supported by the evidence, and this contention is based upon the

alleged failure of the plaintiff to credit the appellant with two amounts, one of $200 and the other of $150. These amounts were paid to plaintiff by Stoll and applied upon claims which the plaintiff had against him on account of material furnished him for other jobs, and the contention in this regard is whether or not plaintiff was justified in so applying the payments. It appears from the evidence that no application of these amounts was made by the appellant and that plaintiff applied them on other indebtedness against Stoll for building materials which were furnished him and used in other buildings. So the question is one of application of payments. The general rule is well settled that, where a debtor makes a voluntary payment to a creditor who has several claims against him and fails to direct application of the payment on any of the claims, the creditor has the right to apply the payment to any of the claims which he has against the debtor. *North v. La Flesh,* 73 Wis. 520, 41 N. W. 633; *Coxe Bros. & Co. v. Milbrath,* 110 Wis. 499, 86 N. W. 174.

There is ample evidence to support the findings that the amounts before referred to were applied by the plaintiff as found by the court, therefore the eighth finding is supported by sufficient evidence. Whether under the facts of this case the court below would not have been justified in making the application as made in the absence of application by the plaintiff we need not decide, because we are satisfied that there is sufficient evidence to support the finding that such application was made by plaintiff. What has heretofore been said respecting the rule of application of payments applies to the contention of appellant that the judgment in favor of the *United States Gypsum Company* should be reversed. The question is one of application of payment, namely, whether two items of payment made by defendant Stoll to the *Gypsum Company* and which were applied to extinguish Stoll's indebtedness to that company on account of jobs other than appellant's were properly applied. There is ample evidence to

support the findings below upholding the judgment in favor of the *United States Gypsum Company.*

Regarding the respondent *Maxwell, Forbes & Stillman Company* it is insisted that the judgment should be reversed on the ground that no sufficient notice of subcontractors' lien was served upon the appellant. The objection made is that the statute (sec. 3315, Stats. 1898) was not complied with, in that the amount due was not stated in the notice, and *Chandler L. Co. v. Fehlau,* 137 Wis. 204, 117 N. W. 1057, is relied upon by appellant. The *Chandler Case,* we think, is distinguishable from the instant case. In that case there was no statement of the amount paid or the amount due, while in the present case the amount of the bill is stated and the amount paid. So the amount due is necessarily inferable from the facts stated. We think the notice was sufficient. *Laev L. Co. v. Auer,* 123 Wis. 178, 101 N. W. 425; *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *West Allis L. Co. v. Wiesenthal,* 141 Wis. 460, 124 N. W. 498.

It is claimed that the judgment in favor of respondent *Herman Mettelmann* should be reversed because *Mettelmann* failed to serve proper notice of lien, in that his notice was directed to "St. Jacobi Congregation (a corporation) of Milwaukee, county of Milwaukee and said state," whereas it should have been directed to the appellant by its proper name, *Evangelical Lutheran St. Jacobi Society of the City of Milwaukee;* and further that in the claim for lien filed the appellant is described the same as in the notice, by a wrong name.

It will be observed upon examination of secs. 3315 and 3320, Stats. (1898), that sec. 3315, respecting the notice, does not require the notice to be directed to the owner, merely that the notice shall be given to the owner, and provides what the notice shall contain, namely, "that he has been employed by

such principal contractor or subcontractor to perform or furnish, and has performed or furnished, such work, labor or material, with a statement of the labor performed or the materials furnished, the amount due therefor from such principal contractor or subcontractor, and that he claims the lien given by this chapter."

It is true sec. 3320 requires the name of the person against whom the demand is made to be stated in the claim for lien, but it also provides that the claim for lien may be amended as pleadings may be. The cross-complaint alleges that *Mettelmann* gave due notice to appellant, and further alleges that he duly filed his claim for a lien, and that such claim so filed contained the name of the person against whom the claim was made, and that notice of the claim for mechanic's lien was given "by delivering the same to Gottlieb Oestrich, president of the *Evangelical Lutheran St. Jacobi Society of the City of Milwaukee,* and leaving the same with him." So it will be seen that the allegations of the cross-complaint are sufficient to show service of the notice on the appellant, and that a claim for lien was duly filed which contained the name of the person against whom the demand was claimed. The court below found these facts in favor of *Mettelmann,* but it is said the findings are not supported by the evidence. Upon the record before us we cannot say that the findings are not supported by the evidence. It appears from the record that the claim for lien filed in the office of the clerk of the court by *Mettelmann* against the appellant was put in evidence without objection. Also notice of subcontractor's lien with affidavit of service was offered and received without objection. It also appears from the certificate to the bill of exceptions that certain exhibits put in evidence are not in the bill of exceptions because they had been lost and could not be found. A point is also made under this head respecting application of payment, but we think the findings as to amount due are sup-

ported by the evidence, and the application of payment was properly made under the rule heretofore stated. From what has been said it follows that the judgment of the court below must be affirmed.

By the Court.—The judgment is affirmed.

PUFFER and others, Respondents, vs. WELCH and others, Appellants.

December 9, 1910—January 10, 1911.

Real-estate brokers: Option contract: Assignment: False representations: Who may maintain action: Assignability of cause of action: Retroactive statute: Discontinuance: Discretion: Appeal: Waiver of right: Acceptance of costs.

1. Where the owners of property, wishing to sell it for a certain net price and to secure to selling agents, as a commission, all that could be obtained in excess of such price, gave to the agents an option to purchase the property at said price, the mere fact that such option ran to the agents "and their assigns" did not render misrepresentations made by the owners to such agents available as the basis of an action of deceit in favor of other persons, not purchasers of the property, to whom such agents afterwards assigned an interest in the option.

[2. Whether agents to whom an option is given for such a purpose can create other agents with equal authority, by assigning to persons, not purchasers of the property, undivided interests in such option, not determined.]

3. The word "assigns" in such option means purchasers of the property to whom the agents might transfer the option, not other persons to whom the agents might transfer an interest in the option for the purpose of creating other agents of the owner.

4. An action by assignees of such option to recover damages on account of false representations made by the owners, by reason of which the holders of the option were unable to make a sale and lost their time and money expended in the attempt to sell and their prospective profits on a sale, is an action for unliquidated damages caused by deceit.

5. To support an action of deceit the misrepresentations must have been made to the plaintiff, or to a third person with the inten-

tion that they be communicated to plaintiff, or so made to a class of which the plaintiff is a member, or so made to the public generally,—in each case with the intention on the part of the person making such misrepresentations that the plaintiff should rely and act thereon; and plaintiff must have so relied and acted.

6. Misrepresentations which accompanied the giving or induced the acceptance of a written instrument running to the vendee or obligee therein named "and assigns," do not run with the instrument so as to give a right of action in favor of persons to whom they were not uttered or addressed or intended to be communicated.

7. Prior to the enactment of ch. 353, Laws of 1907 (sec. 4253, Stats.), a cause of action at law for deceit did not survive and was not assignable.

8. Assuming, without deciding, that ch. 353, Laws of 1907, affects rights of action which accrued prior to and existed when that law went into effect, still it could not be retroactive in the sense that an assignment of an otherwise nonassignable cause of action made several years before that statute went into effect would be thereby made valid.

9. Ordinarily it is within the discretion of the trial court to permit the plaintiff to discontinue an action at law in which no counterclaim is interposed, where the application for leave to discontinue is timely made.

10. Where a complaint fails to state a cause of action and is first challenged by demurrer and motion for judgment on the pleadings, and plaintiff thereafter bases his request for a discontinuance upon an admission that a plea in bar contained in the answer is true, and defendant again requests the trial court to dispose of the objection going to the sufficiency of the complaint before granting leave to discontinue, it is error to permit the discontinuance of the action instead of disposing of it on the other grounds first before the court.

11. The disposition of the case, under such circumstances, should be that which will define rights and finish litigation rather than that which will leave the case open for further and perhaps fruitless and expensive litigation.

12. An appellant who contends that there should have been a judgment dismissing the action on the merits instead of a judgment of discontinuance, did not waive his right to appeal from the latter judgment by taxing and recovering his costs prior to taking the appeal, because, being entitled to the costs under either judgment, he did not thereby do anything inconsistent with the claims urged on the appeal.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

For the appellants there were briefs by *Harrison S. Green,* attorney, and *Doerfler, Green & Bender,* of counsel, and oral argument by *Harrison S. Green.*

For the respondents there was a brief by *Gill, Barry & Mahoney,* and oral argument by *A. R. Barry.*

TIMLIN, J. After the dismissal of a former appeal in this cause (141 Wis. 304, 124 N. W. 406) the appellants caused final judgment to be entered, and now on appeal from that judgment seek to assert the grounds for reversal attempted on the former unauthorized appeal. Pending this appeal Charles A. Welch died, and upon suggestion of his death it is ordered that his appeal revive and be continued in the name of his personal representative, *Charles G. Welch.*

The amended complaint averred that on February 6, 1903, the appellant *White Rock Mineral Spring Company,* a corporation, desiring to make sale of its property, and certain shareholders therein, including the defendant Charles A. Welch, desiring to make sales of their shares of stock therein, "for the purpose and with the intent to give to the defendants, E. R. Estberg, Frederick Phelps, and T. E. Ryan, and their assigns, for a limited time, an exclusive agency for the sale of such property and stock, and to insure to said parties as commissions on such sale all sums which a purchaser found by such agents should be able and willing to pay in excess of the net price therein named, made, executed and delivered to E. R. Estberg, Frederick Phelps, and T. E. Ryan and their assigns an option in writing, whereby the said company and said stockholders, for a valuable consideration, agreed to sell to the said Estberg, Phelps, and Ryan, their heirs and assigns, all of the assets, business, good will, etc., of the *White Rock Mineral Spring Company* within ninety days from the date thereof for $1,250,000." Thereafter and on Feb-

ruary 19, 1903, Estberg, Phelps, and Ryan, for a valuable consideration, sold, assigned, and transferred to the plaintiffs (respondents here) *George D. Puffer, John H. Harris,* and *George B. Harris,* and to C. A. Haertel, each an undivided one-seventh interest in said option. Thereafter the parties owning and holding said option expended time and money in endeavoring to procure a purchaser for the property on the terms of such agreement. Within ninety days they procured a purchaser ready, able, and willing to buy the property on these terms and brought the proposed purchaser and proposed vendors together, whereupon an executory contract of purchase and sale was entered into between the proposed purchaser and the proposed vendors at the price and on the terms of the option agreement.

"That as an inducement to the plaintiffs and others, holders of said option agreement, to accept the same and to undertake the finding of a purchaser of said property and stock, and to induce said parties to expend time and money in finding such purchaser, the said *Mineral Spring Company* and the said Charles A. Welch made and furnished to the holders of said option at or about the time of making of said option agreement a written statement, duly certified to by them, purporting to be an accurate account of the gross earnings and of the expenses and of the net earnings of the business of said company for three years prior to the execution of said option agreement, to wit, for the years 1900, 1901, and 1902, which statement each of the parties to said option agreement implicitly relied upon and on the face [faith?] of the same expended time and money as aforesaid."

These representations were carried into the executory contract with the proposed purchaser. They were not true in fact, and for this reason, upon discovery of their untruthfulness, the proposed purchaser refused to carry out or consummate his said executory contract or to close the purchase, whereby the respondents lost their four sevenths of one million dollars in the capital stock of a new corporation which the proposed purchaser intended to organize and which was

to take over the property; lost also the right to buy $77,000 of the first-mortgage bonds of this new company and $46,200 face value of its shares of stock for the sum of $69,300; all of which would have been of a value stated. Estberg, Phelps, and Ryan, the three original parties to the option agreement, refused to join in this action, therefore were made defendants with the *Mineral Spring Company* and Welch, but they did not answer.

Several answers were interposed by the appellants, but it will be only necessary to notice that the option agreement mentioned in the complaint was before the court as part of one or more of said answers, and that there was a plea of accord and satisfaction wherein it was averred that after the failure of this attempted sale the defendants gave and the plaintiffs received, on May 16, 1904, a new option for $1,400,000 on the same property in satisfaction of plaintiffs' demands described in the complaint arising under the first option.

The cause came on for trial, and the answering defendants objected to the reception of any evidence under the complaint for the reason that it failed to state a cause of action. This objection was overruled without argument and without prejudice and an exception taken. The answering defendants then moved for judgment on the pleadings, which was likewise overruled without argument and without prejudice and an exception taken. The plaintiffs offered evidence consisting of contracts, letters, and depositions. The trial made considerable progress and further hearing was continued until November 16, 1908, when plaintiffs' counsel made the following announcement in open court:

"I have decided to discontinue the action. I have become satisfied in talking with gentlemen upon the other side and counsel that the second option which was set up as a defense, and which in my judgment would be a waiver of every claim under the first option, was actually given, and from what I learn from them and through other sources I am satisfied of

that fact, and therefore I shall enter a discontinuance of the action."

Defendants' counsel requested opportunity to be heard on his motion for judgment on the pleadings and was heard. The circuit court made the following ruling:

"The court is of the opinion that a proper exercise of its discretion in this matter is the granting of the motion of the plaintiffs to discontinue. This accordingly overrules the defendants' motion to grant judgment on the pleadings."

Passing, without deciding, the question whether an option given for the purpose set forth in this complaint in the form of the option annexed to the answer would authorize the grantees therein to create other agents of the seller of equal authority with them by assigning to such persons who were in no sense purchasers of the property undivided interests in such option (31 Cyc. 1425 and cases in note; 2 Am. & Eng. Ency. of Law (3d ed.) 837, 838, 840; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Kohl v. Beach,* 107 Wis. 409, 83 N. W. 657), we come to inquire what is the real nature of the cause of action attempted to be set forth. The complaint avers no breach of contract. It does aver that, by reason of false representations made by the appellants, respondents were damaged in that they were unable to make a sale and so earn their profits and in that they expended time and money in the effort to procure a purchaser. We consider it an action for unliquidated damages founded upon deceit and not an action for damages based upon obtaining money or property by fraud. After setting forth the object and purpose of the option and so limiting its scope it is averred that as an inducement to the plaintiffs and other holders of said option agreement to accept the same and to undertake the finding of a purchaser, etc., the said defendants, at or about the time of making such option agreement, made and furnished to the holders of said option agreement a written statement, etc., which statement each of the parties to the option agreement

implicitly relied upon. It thus appears that the false statement was made at the time of making the option agreement (February 6, 1903) and to the then holders of the option agreement and not to the plaintiffs, and that these holders, Estberg, Phelps, and Ryan, implicitly relied upon the statement. Instead of the usual and necessary averment that the misrepresentations were made to the plaintiffs; or made to a designated third person with the intention that they be communicated to the plaintiffs; or so made to a class of which plaintiffs were members; or so made to the public generally,—in each case with the intention on the part of defendants that plaintiffs should rely and act thereon and that plaintiffs did so rely and act,—we have an averment that the misrepresentations were made to plaintiffs' assignors as an inducement to the plaintiffs and others, holders of the option. The fact that a written instrument runs to the vendee or obligee therein named "and assigns" is not alone sufficient to give a right of action to such assigns for a deceit perpetrated upon their assignors. Nor is that fact sufficient to show that misrepresentations made to and relied upon by the original grantees, vendees, or obligees were intended by the maker thereof to be communicated to or to influence the action of such "assigns." Something more is requisite to this end, as above indicated. From the facts stated, the conclusion that by reason of the proposed option running to Estberg, Phelps, and Ryan and their assigns, the misrepresentations made to Estberg, Phelps, and Ryan were available as a cause of action in favor of any person to whom Estberg, Phelps, and Ryan should assign the option or any interest therein, although such person was not a prospective purchaser of the property, is incorrect. The word "assigns" in the option given for the purpose and under the circumstances stated means a purchaser ready, able, and willing to buy, to whom Estberg, Phelps, and Ryan might assign their option, and not the public generally, and not any person to whom Estberg, Phelps, and

Ryan might for other purposes assign an interest in the option. But in any event it appears that the misrepresentations were made to Estberg, Phelps, and Ryan prior to the time at which the plaintiffs acquired an interest in the option by assignment. Aside from any question of survival of actions, no right of action for deceit would pass to plaintiffs by reason of an assignment of the option under such circumstances. *Tyson v. Renney,* 89 Wis. 518, 61 N. W. 563, 62 N. W. 931; *Dayton v. Fargo,* 45 Mich. 153, 7 N. W. 758; 1 Bigelow, Fraud, p. 214, § 6; *Raymond v. S. P., A. & C. R. Co.* 21 Weekly Law Bull. 103. The persons to whom the alleged misrepresentations were made are not complaining. The proposed purchaser is not complaining, and the misrepresentations were not made to the plaintiffs. They do not run with the option and create a cause of action in favor of a person to whom the representations were not addressed but to whom the option was assigned and who is not a purchaser of the property. Nor would they be available as a cause of action in favor of an actual purchaser unless they were made to such purchaser by the vendor or by vendor's agent authorized so to do, or ratified by vendors. *Hindman v. First Nat. Bank,* 86 Fed. 1013; *S. C.* 98 Fed. 562, 48 L. R. A. 210; *S. C.* 112 Fed. 931, 57 L. R. A. 108. In that case, in order to receive a license to carry on the business of fire insurance in Kentucky, an insurance company falsely represented that it had about $248,000 on deposit in the First National Bank. The commissioner of insurance made inquiry of the bank and the latter corroborated the false statement of the insurance company. Relying on this the commissioner issued a license, and relying on the fact that the commissioner had issued the license and therefore the corporation had the requisite capital paid in, the plaintiff bought shares in the insurance company. On this showing it was held he could not recover. When the case came up again in 98 Fed. 562, there was added to the foregoing facts that the false statement of the bank was by

the act of the bank and the insurance company published in several newspapers and this with the intention of inducing the public to buy shares, the bank at the same time holding some of these shares as collateral. This consideration induced the court of appeals to hold the bank might be liable, TAFT, J., saying:

"Even if it be conceded that the plaintiff had no right to rely on the certificate to the insurance commissioner, the repetition of the contents of the certificate in newspaper publications by the bank and others for the very purpose of misleading purchasers of the stock is quite sufficient to hold the bank."

See, also, *Peek v. Gurney,* L. R. 6 H. L. 377; Cooley, Torts (2d ed.) 577; *Wells v. Cook,* 16 Ohio St. 67; *Hunnewell v. Duxbury,* 154 Mass. 286, 28 N. E. 267; *Fowler v. McCann,* 86 Wis. 427, 56 N. W. 1085; *Louis F. Fromer & Co. v. Stanley,* 95 Wis. 56, 69 N. W. 820.

At the time of the assignment of the interest in the option to plaintiffs on February 19, 1903, the right of action averred in this complaint did not survive and was not assignable under the statute then in force. *Allen v. Frawley,* 138 Wis. 295, 119 N. W. 565; *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536. Assuming, without deciding, that the present statute (ch. 353, Laws of 1907: sec. 4253, Stats.) affects rights of action accruing prior to and existing at the date of the enactment of that law, still it could not be retroactive in the sense that an assignment of an otherwise nonassignable cause of action made several years before that law went into effect could be thereby made valid. We must therefore hold that the complaint fails to state a cause of action in favor of the plaintiffs therein, respondents here.

While ordinarily it is within the discretion of the trial court to permit the plaintiff to discontinue an action at law in which no counterclaim is interposed where the application

for leave to discontinue is timely made (*State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 159; *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342), yet where the complaint fails to state a cause of action and is challenged by demurrer and motion for judgment on the pleadings, and the plaintiff's counsel thereafter bases his request for a discontinuance not upon unexpected failure of evidence on his part, but upon what is in effect an admission that a plea in bar contained in the defendant's answer is true, and the trial court is again requested to dispose of the objections going to the sufficiency of the complaint before granting leave to discontinue, it is error to permit the discontinuance of the action instead of disposing of it on the other grounds before the court. Litigation should not be unnecessarily prolonged. The trial court should have disposed of the case on the motion earlier made rather than upon the later,—on that which would tend to define rights and finish litigation rather than upon that which would leave a case open for other, further, and perhaps fruitless and expensive litigation.

It is contended that the appellants having taxed costs on the discontinuance and collected and received the amount thereof are thereby barred or estopped from prosecuting this appeal from the judgment subsequently entered. If the costs were conditional, or if the appellants were entitled to other or greater costs on discontinuance than they would be on the judgment which they seek in its stead, or if the taking of costs were inconsistent with the claims which might be urged on the appeal, there would be force in this contention. As it is, the costs were something which the appellants were entitled to whether the judgment be one of discontinuance or one dismissing the action for other reasons. In that case the taking of costs is no bar to the appeal. *Fiedler v. Howard,* 99 Wis. 388, 75 N. W. 163; *Grand Rapids v. Bogoger,* 141 Wis. 530, 124 N. W. 659.

It follows that the judgment of the circuit court must be

reversed, and the cause remanded with directions to enter judgment on the pleadings dismissing the complaint without costs in the court below.

By the Court.—Judgment reversed with costs, and the cause remanded with directions to dismiss the complaint.

STATE EX REL. WEINGART and another, Respondents, vs. BOARD OF OFFICERS OF THE CENTRAL SOCIETY OF GRAND COUNCIL OF THE GEGENSEITIGE UNTERSTUETZUNGS GESELLSCHAFT GERMANIA and others, Appellants.

December 9, 1910—January 10, 1911.

Corporations: Officers: Wrongful removal: Remedies: Mandamus: *By-laws: Trial of officers on charges: Procedure: Suspension: Reinstatement: Costs.*

1. Where the governing body of an assessment insurance corporation was large and met but once in two years and in the meantime the entire management was vested in the officers, and some of such officers arbitrarily and unlawfully excluded others from performing their duties, the latter were entitled to relief by *mandamus* to redress the wrong done not only to themselves but to the members at large of the corporation, although the financial interest of the excluded officers was so small and uncertain as not, in itself, to furnish a sufficient basis for such relief.
2. The general rule is that in such a case all remedies provided by the rules of the corporation, by appeal or otherwise, should be exhausted before resort is had to the courts; but such rule is not applicable where the proceedings for removal of the officers are void or where an appeal would be wholly fruitless.
3. *Mandamus*, not *certiorari*, is the proper remedy in such a case.
4. Where the laws of an assessment insurance society provide that every officer against whom charges have been preferred "shall have a just and impartial trial in accord with the laws and rules of this body," such officer is entitled at least to be advised of the charges and given an opportunity to be heard, even though there are no specific regulations governing the procedure.

5. A law of such a society providing that every officer against whom charges have been preferred "shall be suspended from his office until the case is decided," etc., must be given a reasonable construction, and in this case is *held* not to refer to fugitive charges made by an individual on his own responsibility, but only to charges formulated and presented by some local council or other authoritative body after investigation; since otherwise the society might be without any officers for long periods.
6. Officers of an assessment insurance society having acted arbitrarily and without jurisdiction in excluding other officers, costs were properly awarded against them personally, upon the granting of a peremptory writ of *mandamus* directing reinstatement of the excluded officers.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES O'NEILL, Judge. *Affirmed.*

The "Gegenseitige Unterstuetzungs Gesellschaft Germania" is a Wisconsin corporation organized under ch. 86, Stats. (1898), for the purpose of furnishing life insurance to its members on the assessment plan. The highest authority in the corporation appears to be the "Central Society" or the "Grand Council," which consists of all charter members of the corporation and the officers thereof and one member from each subordinate council. This council meets biennially and elects the general officers of the corporation, consisting of a president, vice-president, secretary, treasurer, speaker, guide, guard, and three trustees, who hold their offices for two years and have the active management and control of the affairs of the corporation when the Grand Council is not in session. The organization has some fifty-odd subordinate councils in the state with a membership of over 5,000. The relators, *Korn* and *Weingart,* were members of said society, and at the biennial meeting of the Central Society or Grand Council held in August, 1908, *Korn* was elected "guard" and *Weingart* was elected to the office of "guide" for the term of two years. Each of said officers qualified and entered upon the duties of his office and continued to act as an officer until March 17, 1909. At a meeting held on that day, at which

neither *Weingart* nor *Korn* was present, the president announced that he had suspended *Weingart* and *Korn* because of complaints being filed against them in the subordinate councils to which they belonged. The action of the president was unanimously approved by the eight officers present. The president then stated that complaints had been presented to him by several "vereins" stating that each of the relators had conducted himself in an unworthy manner in certain stated particulars, in consequence whereof he recommended that they be removed from office. This recommendation was approved and the relators were expelled by the unanimous vote of the eight remaining officers, and the secretary was instructed to notify them of the action taken. Neither of the officers so removed was notified that any charges had been filed against him and neither was given any opportunity to be heard. Complaints were filed against *Korn* with the subordinate society to which he belonged, about March 17, 1909, by members of four different subordinate societies, and like complaints were filed against *Weingart* with the society to which be belonged, by members of three other societies, between March 13th and 18th. These complaints were investigated by the local societies with which they were filed and were held to be groundless as to both of the relators. Such conclusions were reached as early as March 25th. Some of the individual members of these local societies either appealed or attempted to appeal from the decisions so made. In addition to the foregoing, complaints were filed against *Weingart* with the president of the Central Society by members of two subordinate societies, and against *Korn* by members of three such societies. These complaints were not acted upon by the officers of the Central Society, aside from the action taken on March 17th, which has been set forth.

On March 19th and again on April 14th the relators attended meetings of the officers of the Central Society and demanded reinstatement, which demand was in each instance

refused. The relators sued out a writ of *mandamus* directed to the officers of the Central Society who had ousted them from office, and demanded as relief that they be reinstated in their respective offices. Judgment in accordance with the prayer of the petition was rendered on February 23, 1910, and a personal judgment for costs was rendered against the eight officers who were named as defendants, from which judgment they prosecute this appeal.

Louis G. Bohmrich, for the appellants.

For the respondents there was a brief by *Quarles, Spence & Quarles, Walter H. Bender,* and *Moritz Wittig,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

BARNES, J. The appellants urge that the judgment should be reversed on the following grounds: (1) Relief will not be granted by *mandamus* because no property rights are involved. (2) The relators should have exhausted their remedy by appeal to the Grand Council of the society before resorting to the courts. (3) If there was a remedy in the courts, *certiorari* proceedings should have been resorted to. (4) Relief should not be granted, because the relators had a full and fair trial as provided by the rules of the society. (5) The relators became suspended from office *ipso facto* as soon as charges were filed against them, and the subsequent removal worked no injury. (6) The appellants acted in good faith, and hence it was error to award a personal judgment against them for costs.

1. The financial interest of the relators was trifling and dependent on contingencies that might not happen. We think it was of too vague and shadowy a character to furnish a sufficient basis for the remedy pursued. It does not follow, however, that because no money was involved the action might not be maintained. The governing body of the society was large and met but once in two years. In the meantime the

entire management of the affairs of the corporation was vested in the officers. It was the duty of each individual officer to use his best endeavors to promote the welfare of the corporation and to perform the duties of his particular office. By so doing he was carrying out a trust that was reposed in him by the central body of the society. If he was unlawfully excluded from office he could not execute that trust. By remaining silent he might well be subjected to just animadversion for failing to assert his rights, and such failure might well operate to the detriment of the corporation. The corporation itself is a creature of the laws of this state, and the power of our courts to prevent abuses in corporate management is very broad. *State ex rel. Cuppel v. Milwaukee C. of C.* 47 Wis. 670, 679, 680, 3 N. W. 760. Where some of the officers of a corporation arbitrarily and unlawfully exclude others and prohibit them from performing their functions, it would seem reasonable that those excluded should have some speedy and adequate remedy to redress the wrong done, not only to themselves, but to the members at large of the corporation, particularly where the corporation itself could not afford relief in the premises. The weight of authority supports this view and it seems to be more consonant with reason than the contrary one. *Rex v. Barker,* 3 Burr. 1265; *Lewis v. Whittle,* 77 Va. 415; *Fuller v. Trustees, etc.* 6 Conn. 532; *Lahiff v. St. Joseph's T. A. & B. Soc.* 76 Conn. 648; *Strong, Petitioner, etc.* 20 Pick. 484; *Conlin v. Aldrich,* 98 Mass. 557; *Burt v. Grand Lodge, etc.* 66 Mich. 85; Merrill, Mandamus, § 49.

2. Under the rules of the society the relators might have prosecuted an appeal from the order of expulsion to the Grand Council, and it is urged that it was incumbent on them to exhaust all remedies provided by the society, by appeal or otherwise, before resorting to the courts. There is no doubt that such is the general rule. 1 Bacon, Ben. Soc. § 108 and cases cited; 20 Cyc. 201, 204, and cases cited. There are,

however, well recognized exceptions to this rule. Where the proceedings for removal are void, resort may be had to the courts without first exhausting the remedies by appeal within the organization. *Langnecker v. Trustees, etc.* 111 Wis. 279, 87 N. W. 293; *People ex rel. Keefe v. Women's C. O. of F.* 162 Ill. 78, 83, 44 N. E. 401; *People ex rel. Deverell v. Musical Mut. P. Union,* 118 N. Y. 101, 23 N. E. 129; Bacon, Ben. Soc. § 107; *Hall v. Supreme Lodge, etc.* 24 Fed. 450; *Mulroy v. Supreme Lodge, etc.* 28 Mo. App. 463; *Blumenfeldt v. Korschuck,* 43 Ill. App. 434; *State ex rel. Cuppel v. Milwaukee C. of C.* 47 Wis. 670, 682, 683, 3 N. W. 760. We entertain no doubt whatever that the removal proceedings were void in the instant case. There is still another reason why the relators were not obliged to appeal. The appeal could not possibly be heard before their terms of office would expire. The alleged remedy would therefore be no remedy at all, because it would afford no relief. A fruitless appeal need not be taken as a condition precedent to seeking redress in the courts. *Brown v. Supreme Court I. O. of F.* 176 N. Y. 132, 68 N. E. 145; *State ex rel. Schrempp v. Grand Lodge, etc.* 70 Mo. App. 456, 465; Bacon, Ben. Soc. § 107.

3. There is practically no conflict in the authorities in holding that if a right existed at all to proceed in the courts, *mandamus* was the proper remedy.

4. That the relators did not have an impartial trial is too plain to admit of controversy. Sec. 1 of law 5 of the society provided that an officer of the Central Society might be removed by a three-fourths vote of the officers present, for neglect of his official duties or unworthy behavior. Sec. 3 of said law 5 provided that every officer against whom charges have been preferred "shall have a just and impartial trial in accord with the laws and rules of this body." No method of procedure was provided for, but the accused were entitled to a "just and impartial trial." This could only mean that they must be informed of the nature of the charges against

them and be given an opportunity to be heard. The action taken was an arbitrary star chamber proceeding, which could not, even by courtesy, be said to have the semblance of a trial, much less a fair or impartial one. The mere fact that no specific regulations were adopted governing the mode of procedure could make no difference. None were necessary. If the appellants desired to place the relators on trial, they could do so only by advising them of the charges made and giving them a reasonable chance to be heard. *Wuerfler v. Trustees, etc.* 116 Wis. 19, 92 N. W. 433.

5. Sec. 3 of law 5 above referred to also provided that every officer against whom charges have been preferred "shall be suspended from his office until the case is decided, unless the society orders otherwise by three-fourths majority of the members present." It is argued that under this law the relators were rightfully suspended from office at the time this proceeding was begun. The charges filed with the subordinate councils against the relators had been investigated and found groundless, and the appellants were advised of that fact before suit was begun. There were on file some charges made by individual members of the society in an informal way, which had not been disposed of when the suit was started. This law must have some reasonable construction that will permit the society to carry on its business if possible. All is not peace and harmony and brotherly love at all times, even in benevolent associations. They have their cliques, their factions, and their disagreements as well as other organizations, and necessarily so because they are composed of mortals. These internal disputes frequently become acrimonious and engender much ill feeling. Now, if the construction contended for by the appellants is correct, any one of the 5,300 members of the society could, immediately after the adjournment of the Grand Council, file charges against all of the officers, and they would thereupon be suspended and the society would be without officers for the ensuing two years. The

rule referred to was not intended to place the society in any such predicament as this. So we think the charges therein referred to do not mean fugitive charges made by some individual on his own responsibility, but charges formulated and presented by some local council or other authoritative body, after investigation. In other words, the charges must be the result of fair preliminary investigation and must have passed the scrutiny of some one besides the individual who prefers them and must be of sufficient dignity to warrant suspension, before they can operate to suspend an officer from exercising his functions of office. Indeed, it would seem that if the rule were not susceptible of such a construction it might be held void for unreasonableness. *Golden Star Lodge v. Watterson*, 158 Mich. 696, 123 N. W. 610.

6. The appellants having acted arbitrarily and without jurisdiction, costs were properly taxed against them. *State ex rel. Wunderlich v. Kalkofen*, 134 Wis. 74, 113 N. W. 1091; *State ex rel. School Dist. v. Wolfrom*, 25 Wis. 468.

By the Court.—Judgment affirmed.

UNION LIME COMPANY and another, Appellants, vs. RAILROAD COMMISSION OF WISCONSIN and another, Respondents.

December 10, 1910—January 10, 1911.

Railroad Commission: Powers: Spur tracks: Constitutional law: Legislative power: Delegation: Eminent domain: Public use: Jurisdiction: Disputed title to land: Parties: Issues in action against Commission: Hearing before Commission: Reasonableness of order: Time for completion of track.

1. Where the Railroad Commission, in a proceeding instituted under sec. 1797—11*m*, Stats. (Laws of 1909, ch. 481), to compel construction of a spur track, exercises powers derived from that statute, the constitutionality of the statute is involved, although it was not necessary to exercise all the powers conferred thereby.

2. The power conferred upon the Railroad Commission by sec. 1797—11*m*, to determine the existence of certain facts which must exist before a railroad company can be compelled under that statute to construct a spur track, is not legislative power and may be delegated to the Commission.
3. A spur track which, under sec. 1797—11*m*, a railroad company may be required to build, is not private, even though it serves a single industry the owners of which bear its initial cost, but becomes when built a part of the trackage of the railroad company, to be maintained and operated by it, open to the use of any one who may desire upon equal or equitable terms, and subject to state control under general laws; and hence land taken for the right of way of such a spur track is taken for a public, not for a private, use.
4. Sec. 1797—11*m*, providing for construction of a spur track whenever, among other things, its construction and operation "is not unreasonably harmful to public interest," does not contemplate that such a track may be built even though the sum total of its effect is somewhat harmful to public interest, but only when, as determined by the Railroad Commission, the public benefits so far outweigh any harm to public interest that the construction is advisable.
5. The authority of the Railroad Commission to act under sec. 1797—11*m* is not confined to cases wherein it must exercise all the powers delegated: it may exercise such of those powers as are necessary in the particular case, be they many or few. Thus, although no right of way need be acquired for a spur track, the Commission may proceed to discharge the other duties imposed upon it by the statute.
6. The Railroad Commission has no jurisdiction, in a proceeding to compel construction of a spur track, to pass upon a question of disputed title to land, even if all the proper parties are before it. That is purely a judicial question which must be determined by a court having jurisdiction thereof.
7. In an action against the Railroad Commission to set aside its order requiring construction of a spur track, it was error for the trial court to pass upon the validity of easements held by the railroad company, when such company was not a party to the action.
8. Even if the railroad company had been a party to such action the issue as to title to the right of way could not properly arise therein, being an issue between the company and other persons claiming the title.
9. An order of the Railroad Commission directing the construction

of a spur track, made without giving to any party interested therein or affected thereby an opportunity to be heard, must be set aside for that reason. A hearing previously given as to an entirely different route for the track, in which all parties participated, was not equivalent to a hearing as to the route finally selected.

10. An order of the Railroad Commission providing that a spur track should be constructed within thirty days did not give the railroad company a reasonable time, in view of the fact that condemnation of the right of way might be necessary.

BARNES and SIEBECKER, JJ., dissent.

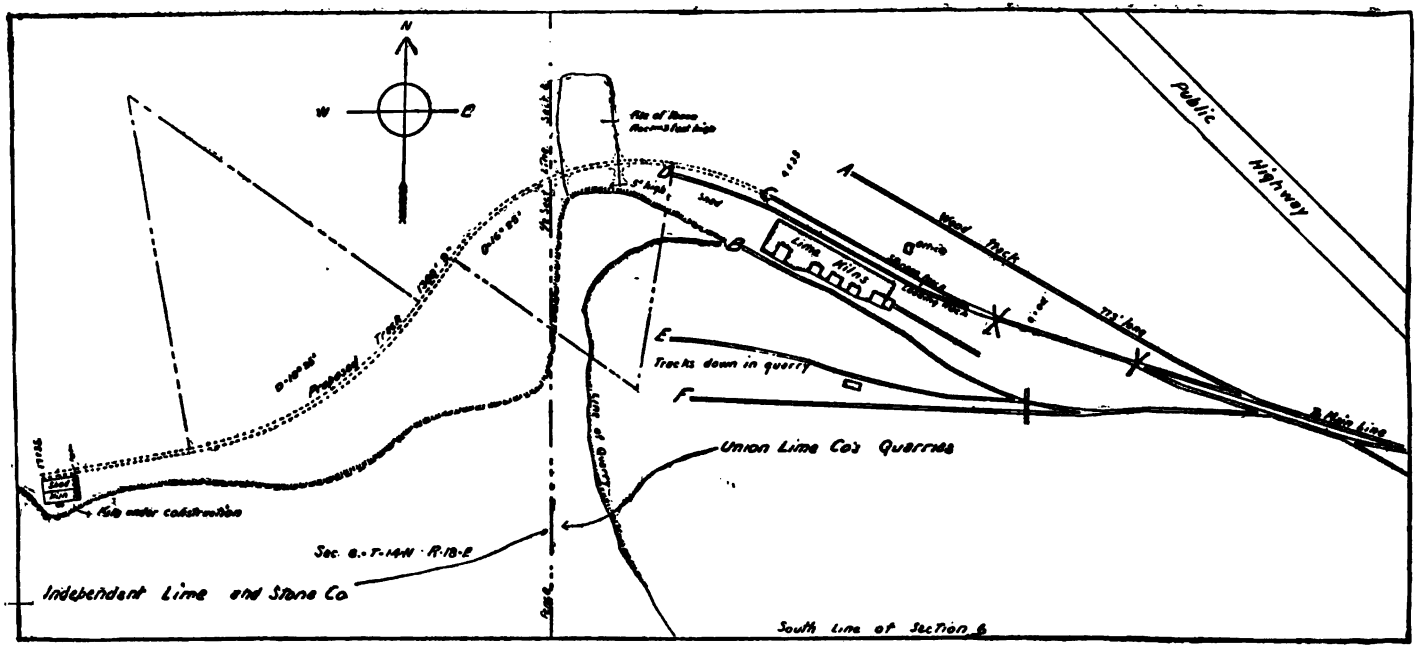
APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The plaintiffs, *Union Lime Company* and *Nast Bros. Lime & Stone Company,* and the defendant *Eden Independent Lime & Stone Company* are the owners of parcels of land in section 6, town 14, range 18, in Fond du Lac county. The *Nast Company* owns the southeast quarter of the southeast quarter of said section and also the east two acres of the southwest quarter of the southeast quarter. The *Union Lime Company* owns the southwest quarter of the southeast quarter, except the east two acres thereof. The *Eden Company* owns twenty-three acres, parcel of the southeast quarter of the southwest quarter of said section. The lands of the parties thus lie in a line east and west upon the south side of section 6.

The *Nast Company* and its predecessors in title have for thirty years past operated and still operate extensive lime-kilns and a stone-crushing plant upon its premises. For a similar time the *Union Company* and its predecessors in title have also operated and still operate upon its premises extensive lime-burning and stone-crushing plants. The *Eden Company* was organized in the spring of 1909 and has partially completed a single lime-kiln on its premises but has never conducted any business thereon. In 1880 a spur or side track was built by the Chicago & Northwestern Union Railroad Company, the predecessor of the Chicago & Northwestern Railway Company, extending from a point on its main

line about one mile north of Eden station in a southwesterly direction across the land of the *Nast Company* and for a distance by the course of the track of about seventy-five rods upon the premises of the *Union Company,* terminating at a point about 185 feet east of the west line of the *Union Company's* land. From time to time since 1880 branches or side tracks from this main spur have been built and all of these tracks have always been used exclusively for the purpose of affording switching facilities to the plants of the plaintiffs. The map accompanying this statement of facts (see p. 527) shows the tracks upon the land of the *Union Company* and the proposed extension of one of these tracks to and upon the land of the *Eden Company* asked for by the latter in the proceedings before the *Railroad Commission.* The premises of the *Nast Company* lie to the east of those shown upon the map and upon them are also numerous tracks.

In June, 1909, the *Eden Company,* being about to erect a lime-kiln, applied to the Chicago & Northwestern Railway Company for a side track connecting with one of the tracks upon the *Union Company's* property. The railway company claimed that its rights in the trackage serving the *Union Company* did not permit it to make any extension for the purpose of serving others without the consent of the *Union Company.* In August, 1909, the *Eden Company* filed a petition with the *Railroad Commission* praying for the extension of the track marked C on the map referred to, from the terminus thereof to the site of the *Eden Company's* lime-kiln, alleging that it was entitled to have such extension made under ch. 481, Laws of 1909 (sec. 1797—11*m,* Stats.). Thereupon notice of the filing of this petition fixing a date for the hearing thereon was served upon the railway company, but no notice was given to plaintiffs and they were unaware of the proceedings until the making of an order by the *Railroad Commission* therein. A hearing being had before the *Railroad Commission* on September 16, 1909, at which the rail-


N
W
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Site of Bone Machine Foot bridge
Public Highway
Wood Track
Lime Kilns
Tracks down in quarry
Union Lime Co's Quarries
Sec. 8.-T-14N-R-18-E
Independent Lime and Stone Co
South Line of Section 8

way company made no opposition to the extension of the track prayed for, an order was entered by the *Commission* directing the building of the track as prayed along the line indicated upon the map.

Thereafter and on October 29, 1909, the plaintiffs filed with the *Railroad Commission* a petition asking that the aforesaid order be vacated and that they be given leave to intervene in the proceedings. This application being granted, plaintiffs filed an answer alleging that the extension of the track as directed in the previous order of the *Commission* would greatly injure their property and interfere with their business, and prayed that said order might be rescinded, and that if the *Commission* should require a spur track to be constructed the same be ordered built so as not to cause unnecessary and unreasonable damage to their property. A second hearing was had before the *Commission* on December 17, 1909, at which a considerable amount of testimony was taken and in the course of which the president of the *Eden Company* testified that his company was able and willing to pay the expense of constructing a track from some point on the main spur between the points marked X and Y on the map, thence between the track marked C and the *Union Company's* office building, to and upon the *Eden Company's* land. March 24, 1910, the *Railroad Commission* made an order directing the construction of a track upon the line last described, but not providing for payment by the *Eden Company* of the cost of such track. Upon the promulgation of this order the railway company called the attention of the *Railroad Commission* to the fact that no provision was made therein for the payment of cost of the track ordered and that the company had no right of way over the line proposed. No protest or objection was made by plaintiffs to the *Commission's* order of March 24th, and there was no further hearing or proceedings before the *Commission,* but on April 1, 1910, the *Commission,* without notice to any of the parties, made a third

order requiring the railway company to extend the track marked D upon the map to and along the kiln shed of the *Eden Company.* The order further provided that "thirty (30) days is deemed a reasonable period of time within which to comply with the provisions of this order."

On April 21, 1910, this action was commenced against the *Railroad Commission* to vacate and set aside the third and last order of the *Commission* and to enjoin the execution thereof. On the trial, May 23, 1910, the *Eden Company* asked leave to intervene and become a party defendant, which leave was granted over plaintiffs' objection. The trial court held that sec. 1797—11*m,* Stats. (Laws of 1909, ch. 481), confers upon the *Railroad Commission* power to compel construction of spur tracks to such industries as that proposed to be operated by the *Eden Company* and, as an incident, to compel the railway company to acquire the necessary right of way for such spur; that if the company has an easement across the property of the *Union Company* the order of the *Railroad Commission* does not necessitate the exercise of the power of eminent domain; that certain papers executed April 3, 1880, confer upon the railway company a right of way over the *Union Company's* land; that this right of way was not limited to the use of the quarries of the *Union Company;* that therefore the question whether sec. 1797—11*m,* Stats. (Laws of 1909, ch. 481), contravenes the state or federal constitution was not involved, and that the order of the *Railroad Commission* was lawful and not unreasonable. Judgment dismissing the complaint and for costs was entered June 7, 1910, from which this appeal is taken.

For the appellants there was a brief by *Lines, Spooner, Ellis & Quarles,* attorneys, and *Geo. Lines,* of counsel, and oral argument by *Geo. Lines.*

For the respondents there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, for the *Railroad Commission,* and *Ecke & Hughes,* attorneys for the

Eden Independent Lime & Stone Company, and oral argument by *Mr. O. H. Ecke* and *Mr. Jackson.*

VINJE, J. The trial court expressly stated in its decision that it did not pass upon the constitutionality of sec. 1797—11*m,* Stats. (Laws of 1909, ch. 481), inasmuch as it held the railroad company had valid easements across the lands over which the spur track was to be built and hence it was not necessary for it to invoke the power of eminent domain granted by the statute. Counsel for defendants suggest that this court may likewise dispose of the case without passing upon the constitutionality of said section. It appears, however, that the proceedings were in terms instituted pursuant thereto and that the *Railroad Commission* acted under it. That being so, it is not perceived how its acts thereunder can be valid if the statute itself is unconstitutional. Indeed, the trial court by its judgment dismissing the action sustained the validity of the proceedings and in effect held it constitutional. The fact that the *Railroad Commission* was not required to exercise all the powers conferred upon it by the statute did not obviate the necessity of passing upon its constitutionality, since the powers it did exercise were derived therefrom. So the case directly involved the constitutionality of sec. 1797—11*m.* That section reads as follows:

"1. Every railroad shall acquire the necessary rights of way for, and shall construct, connect, maintain and operate a reasonably adequate and suitable spur track, whenever such spur track does not necessarily exceed two miles in length, is practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise, and its construction and operation is not unusually unsafe and dangerous, and is not unreasonably harmful to public interest.

"2. Such railroad may require the person or persons, firm, corporation or association primarily to be served thereby, to

pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor; provided, however, that when any such person, firm, corporation or association, shall be required by the commission to deposit with the railroad, the total estimated cost, as herein provided, such person, firm, corporation or association, may offer or cause to be offered, a proposition in writing to such railroad, to construct such spur track, such proposition to be accompanied by a surety company bond, running to such railroad, and conditioned upon the construction of such spur track in a good and workmanlike manner, according to the plans and specifications provided by such railroad, and approved by the commission, and deposit with such railroad the estimated cost of the necessary right of way for such spur track; and whenever such proposition and security company bond shall be offered the person, firm, corporation or association primarily to be served thereby, shall not be required to deposit as herein provided, as the total estimated cost of such construction, an amount in excess of the estimated cost of the right of way, and the total amount stated in such written proposition. Provided further that before the railroad shall be required to incur any expense whatever in the construction of said spur track, the person, firm, corporation or association primarily to be served thereby, shall give the railroad a bond to be approved by the commission as to form, amount and surety, securing the railroad against loss on account of any expense incurred beyond the amount so deposited with the railroad.

"3. Whenever such spur track is so connected with the main line, as herein provided, at the expense of the owner of such proposed or existing mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and any person, firm, corporation, or association shall desire a connection with such spur track, application therefor shall be made to the commission, and such person, firm, corporation or association shall be required to pay to the person, firm, corpora-

tion or association that shall have paid or contributed to the primary cost and expense of acquiring the right of way for such original spur track, and of constructing the same, an equitable proportion thereof, to be determined by the commission, upon such application and notice, to the persons, firms, corporations or associations that have paid or contributed toward the original cost and expense of acquiring the right of way and constructing the same."

It will be observed from the first subdivision of the section that four facts must co-exist before a railroad can be compelled to acquire a right of way, construct, maintain, and operate a spur track, namely: (1) the spur track must not exceed two miles in length; (2) it must be practically indispensable to the successful operation of the existing or proposed plant, industry, or enterprise; (3) its construction and operation must not be unusually unsafe and dangerous; and (4) it must not be unreasonably harmful to public interest. The legislature has delegated to the *Railroad Commission* the power to determine whether or not these four facts co-exist. If the *Commission* finds that they do, then, upon the statute being complied with, the railroad is required to build the track, otherwise not. The exercise of such power by the *Railroad Commission* is not the exercise of legislative power and may therefore be delegated to it. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Commission,* 137 Wis. 80, 117 N. W. 846; *Wayman v. Southard,* 10 Wheat. 1; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 129 N. W. 600.

Plaintiffs challenge the constitutionality of the statute on the ground that the side tracks provided for are private, and that land taken for right of way for such side tracks is taken for a private and not for a public use, contrary to the provisions of sec. 13, art. I, of the constitution of this state, and contrary to the provisions of the XIVth amendment to the constitution of the United States. If it be conceded that the side tracks are private, then the objections raised by plaint-

iffs must be deemed well taken. But the case of *Chicago & N. W. R. Co. v. Morehouse,* 112 Wis. 1, 87 N. W. 849, negatives such a concession. It was there held that the taking of land for a side track under sec. 1831*a,* Stats. (1898), was a taking for a public use even though the side track ran to a single industry and the owners thereof were to bear a large part of the expense. That section authorized a railroad company, in its discretion, to acquire right of way by condemnation for a spur track not exceeding five miles in length to any industry therein mentioned, without any restrictions as to its being practically indispensable to the successful operation thereof, or unusually unsafe and dangerous, or unreasonably harmful to public interest. If it was a valid exercise of legislative power to authorize a railroad company, in its judgment, to condemn a right of way for a spur track five miles in length without any restrictions as to public safety or interest, it must certainly be held to be so to authorize the *Railroad Commission* to order a spur track two miles in length to be built under the safeguards to public interests provided by sec. 1797—11*m,* Stats. (Laws of 1909, ch. 481).

Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty

to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one else using it, or the extent of such use. *Chicago & N. W. R. Co. v. Morehouse,* 112 Wis. 1, 87 N. W. 849; *Ulmer v. Lime Rock R. Co.* 98 Me. 579, 57 Atl. 1001. That such tracks are to be open to the use of the public generally is clearly evidenced by the statute, for it speaks of the industry *primarily* to be served and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any one who may require it. Its operation, too, is subject to state control under general laws, and neither the railroad nor the owner of the industry can in any respect interfere with such control. The reasons for holding the provisions of sec. 1831*a*, Stats. (1898), constitutional apply more strongly to the provisions of sec. 1797—11*m*, and they are so clearly set forth in the case referred to that a more extended discussion of the subject here is not deemed necessary.

Plaintiffs contend further that the statute is unconstitutional because the last clause of subd. 1 contemplates that a spur track may be built even though the sum total of its effect is somewhat harmful to public interest. We think no such construction should be given to the clause. Every railroad track is in many ways harmful to public interest. The operation of trains thereon results in frightening horses on public highways; in accidents on railway crossings; in setting fire

to adjacent property; in creating smoke and noise, more or less of a nuisance in every village and city, as well as in marring the beauty of scenery through which it passes. In these and other respects every railroad may be said to be harmful to the public interest. The legislature, mindful of these facts, wisely conferred upon the *Railroad Commission* the right to determine when any or all of these or other facts were unreasonably harmful to the public interest, and provided that when in the judgment of the *Railroad Commission* they were so, the spur track should not be constructed. In other words, the legislature left it to the *Railroad Commission* to determine when the public benefits so far outweighed any harm to public interest as to render it advisable to construct the spur track. Certainly no just criticism can attach to provisions so considerate of public welfare.

It is also argued by the plaintiffs that the statute nowhere indicates an intent to confer upon the *Railroad Commission* the power to order the construction of a side track when it is not necessary to obtain a right of way therefor. Hence, they claim, if the trial court correctly held that no right of way had to be acquired in this case, then the *Railroad Commission* had no authority to act, since it can do so only in cases when it is necessary to acquire a right of way. This argument is evidently based upon the erroneous assumption that when the legislature has delegated several powers to the *Railroad Commission* it cannot act in any case relative thereto unless it exercises all the powers thus delegated. The statute is not susceptible of such a construction. The *Railroad Commission* may exercise only such powers as the statute requires in the particular case, be they many or few. If no right of way has to be acquired, obviously the *Railroad Commission* has no duties to perform relative thereto or the cost thereof; but it can and should proceed to discharge the other duties imposed upon it by the statute.

The Chicago & Northwestern Railway Company was not a

party to this action and yet the trial court adjudicated upon the validity of certain easements held by it, and the *Railroad Commission* did likewise—the railway company, however, being a party to the proceedings before it. The statute requires that the *Railroad Commission* shall make a preliminary estimate of the cost of the right of way and the cost of construction, and shall require the total amount of such estimate to be deposited by the person primarily to be served, unless he shall deposit a bond for construction, in which case only the estimated cost of the right of way need be deposited. In either case, in addition thereto, a bond to indemnify the railroad against any expense above that estimated must be given. In order to determine the amount of such deposit a preliminary inquiry into the question of the title and value of the land to be acquired must be made. But the statute does not contemplate that the *Railroad Commission* should pass upon the question of title. If it orders the track to be built, it becomes the duty of the railroad to secure the right of way by purchase, condemnation, or otherwise, if a right of way must be secured. Such a duty may be imposed upon the railroad. *Wis., M. & P. R. Co. v. Jacobson,* 179 U. S. 287, 45 Lawy. Ed. 194. Should the *Railroad Commission* be in doubt as to whether or not a right of way must be acquired, it can protect the railroad by requiring a sufficient bond to be given to indemnify it fully in case it has to be acquired. But it has no jurisdiction to pass upon a question of disputed title even if all the proper parties are before it. That is purely a judicial question and must be determined by a court having jurisdiction thereof; and the trial court, in the action to test the validity of the order of the *Railroad Commission,* should not, in the absence of the railway company, have passed upon the question of disputed title. Even if the railway company had been a party to that action the issue of title to the proposed right of way would have been an issue between the owner thereof or those claiming title thereto

and the railroad or the person primarily to be served; and, under the rule laid down in *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023, such issue could not be joined with the action against the *Railroad Commission.* The trial court, therefore, erroneously passed upon the validity of the easements held by the railroad and its judgment thereon must be set aside.

By reference to the accompanying map and statement of facts it will be seen that the *Eden Company* first petitioned for the extension of track C, and that after a hearing, of which the plaintiffs had no notice and in which they did not participate, the application was granted. Plaintiffs were then allowed to intervene, and, upon a hearing, the first order of the *Railroad Commission* was vacated, and a track beginning on the main spur between the points marked X and Y, thence between the track marked C and the *Union Company's* office building to and upon the petitioner's land, was ordered constructed. This order inadvertently failed to provide for the payment of the cost of such track by the petitioner, and the *Railroad Commission,* upon its attention being called to the fact by the railway company, vacated the order, and, without notice to any of the parties, made a third order requiring the railway company to extend track D to the kiln shed of the petitioner. The validity of this last order is in question. Plaintiffs earnestly contend that this court should declare it unreasonable because it orders the extension of their loading track and therefore causes almost irreparable loss and hardship to their business. Had the order been made upon notice and with opportunity for the parties to be heard, it is doubtful if, under the rule laid down in *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905, this court would interfere with the exercise of the *Railroad Commission's* discretion in determining that track D should be extended, though it seems from an inspection of the map that the selection of such track would be needlessly

injurious to plaintiffs. In this, however, we may be in error. But it appears from the record before us that the order was made without any opportunity given to any party interested therein or affected thereby to be heard, and for that reason it must be set aside. True, a hearing had previously been given as to an entirely different route, in which all parties participated, but that is not equivalent to a hearing upon the route finally selected by the *Railroad Commission*. It seems to us that a consideration of the extension of track C or the building of an independent track starting between the points X and Y is so unrelated with and foreign to a consideration of the extension of track D that it cannot be regarded as any hearing at all upon the latter question.

The order also provided that the track should be built within thirty days. In view of the fact that condemnation proceedings may be necessary, that is not a reasonable time within which to complete the track. We express no opinion as to what route should be selected, and nothing herein said relative thereto is intended in any way to limit the full and free scope of the judgment of the *Railroad Commission* upon that question. After a hearing it will no doubt fix upon a route that will best subserve the interests of all parties, and allow the railway company a reasonable time, in view of the situation as it may then appear, within which to construct the track.

By the Court.—The judgment of the circuit court is reversed, and cause remanded for further proceedings according to law.

TIMLIN, J. I concur in this opinion and append this note merely to call attention to the fact that the decision in the instant case is incompatible with and in effect overrules the majority opinion and vindicates the dissenting opinion of MARSHALL, J., in *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033. The same is true, I think, of the decision in

State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co. 145 Wis. 337, 129 N. W. 600.

BARNES, J. (*dissenting*). It is by no means clear that the railway company had a right of way to the west line of the southwest quarter of the southeast quarter of section 6. About thirty years had elapsed since the conveyances were made and the spur tracks had never been extended across this description. The landowner was entitled to its day in court to litigate the right of the railway company to claim an easement across its premises. The question was a purely judicial one, and, it being apparent that a substantial controversy existed, the *Commission* should not have undertaken to decide it, but should have required a bond or deposit to cover the cost of securing the right of way. The initial mistake led to still another in fixing an unreasonably short time within which the railway company should complete the spur. However, I do not think that the order of the *Railroad Commission* should be disturbed or that the judgment should be reversed because such order did not require a bond to be executed or a deposit to be made to indemnify the railway company for cost of right of way or because of the shortness of the time within which the railway company was required to perform. These are matters which affect the railway company only, and it is finding no fault whatever with the order. The appellants are not concerned because the order is faulty in the respects mentioned, and the railway company should be able to take care of itself without the interposition of a friendly champion.

The majority of the court think that the order is unreasonable because it provided for the extension of the spur track designated D without giving the appellants an opportunity to be heard. I am unable to agree to this conclusion. Track D runs parallel with the lime kilns and as close thereto as practicable, and is used for the storage of cars while being

loaded with lime from the kilns. Track C runs parallel with track D and a sufficient distance therefrom to permit cars to conveniently pass. This track is also used to store cars while they are being loaded from the kilns. The original petition prayed for an extension of track C, and the original order of the *Commission* granted the prayer of the petition in this behalf. The contention of the appellants before the *Commission* was twofold: (1) The *Eden Company* should not be allowed the use of any portion of the spur track; and (2) if such use were permitted, the spur track asked for should connect with the one in use at a point nearer to the main line than the switch which forms the entrance to track C, or, in other words, the connection should be so made that cars on loading tracks C or D would not be interfered with in switching cars to and from the *Eden* plant.

In reference to the use to which switch tracks C and D were put, Mr. McConnell, the superintendent of the *Union Lime Company,* testified before the *Commission* as follows:

"Tracks C and D are used for storing cars while they are being loaded. Could load ten cars on the two tracks, one on each track opposite each of the five kilns. *Q.* In loading these cars, how is it arranged so as to load cars on track C? *A.* We place a wheeling plank from the car down on track D to the car on track C and wheel across. *Q.* Does it occur in the prosecution of your business there that it is necessary to have cars placed on both of these tracks C and D for loading lime? *A.* Yes, sir. *Q.* How frequently does that occur? *A. Every day in the year.*"

This witness further testified on cross-examination that it was a matter of necessity to use track C for loading lime. He also testified that it was "more convenient to have cars opposite each other than it is to have to wheel clear across the shed and load the car on the first track." The attorney for the *Eden Company* endeavored on cross-examination to secure an admission to the effect that it would be as convenient for loading to store all the cars on track D, and move them along

as they were loaded, as it would be to use both tracks, but he was very decided in his statement that such would not be the case.

Thus it will be seen from the evidence of the principal witness for the appellants that tracks C and D were equally necessary for loading purposes throughout the year, and this is the testimony which the *Commission* had before it when it concluded to order an extension of track D rather than of track C. There were good reasons for doing this. If one or the other of the tracks were extended, it made no difference to the appellants which should be selected. Track D approached nearer the *Eden Company's* premises than did C. So it would be cheaper for that company to have track D extended, and besides, it might well be that the railway company owned the right of way to the *Eden Company's* premises along the line of track D, so that condemnation proceedings with their concomitant expenses and delays would be unnecessary. The fact that the petition asked for the extension of track C did not obligate the *Commission* to extend such track or else refuse to order any extension. Pleadings before the *Commission* are informal. The *Commission* is not a judicial body that is bound by strict rules of procedure. It deals with substance rather than nonessentials. It acted within its jurisdiction in making this order, and such an order is made *prima facie* lawful and reasonable by statute (sec. 15, ch. 362, Laws of 1905). It must stand until it is declared unreasonable by a court of competent jurisdiction in a suit brought by the aggrieved party (sec. 16, ch. 362, Laws of 1905). What the petitioner wanted primarily was the extension of a spur track onto its premises at a reasonable cost. Which track was extended was immaterial to it so long as the expense was not too burdensome. The matters of running the spur track from the main line and of extending the wood track A and the loading tracks D and C and of tapping the main spur track between the switch leading to track C and the main line

were all considered and evidence was offered in relation thereto. In addition to this, the *Commission* was not concluded by this evidence. It might make an independent investigation if it saw fit, by sending its engineers or experts to examine the *locus in quo,* or the commissioners might themselves make such an examination and consider what they observed. But, taking the testimony before the *Commission,* it is plain that every objection to the extension of track D applied with equal force to the extension of track C.

This brings us to a consideration of the evidence offered in court. Very little evidence was given on the trial upon the question we have been considering. Mr. Robertson, the president of the *Union Lime Company,* said it would be a greater damage to his company to have track D extended than to extend track C, for the reason that "this that we call our lime track is constantly in use and cars have necessarily to be pulled in and out on that track. The track marked D is in more constant use than the track marked C. The extension of either of the tracks marked C and D would cause very much greater interference with our business and damage to our property than the construction of a track commencing at some point on the existing track between the points marked X and Y on Exhibit 10, because these tracks marked C and D are our loading tracks, both used for loading." The points X and Y referred to were between tracks C and D and the main line. The foregoing embodies every shred of new testimony offered on the trial concerning the damage that would result from the extension of track D rather than track C. The evidence taken before the *Commission* was before the court. Mr. Robertson was one of the general officers of the company, which operated a large number of kilns at various places, and resided in Milwaukee. Mr. McConnell was the superintendent in charge of the *Eden* quarries. In giving his evidence before the *Commission* Mr. Robertson did not assume to be familiar with the details of carrying on the business at Eden, but referred his inquisitors to Mr. McConnell.

So the trial court had before it the evidence of McConnell that tracks C and D were put to equal use in loading and that both were used every day in the year, and the evidence of Robertson that it would be more inconvenient to his company to extend track D than it would to extend track C, because the former was in more constant use than the latter. On this state of the evidence the trial court found that the order was "not an unreasonable exercise of the power vested in the defendant *Railroad Commission.*"

The *Commission* having jurisdiction to make the order, it was, as before stated, *prima facie* reasonable until declared unreasonable by the courts. The appellants could not disregard it, but were obliged to pursue the course which they did; that is, to bring an action to set the order aside because it was unreasonable. It was incumbent on them to show clearly and satisfactorily by the evidence offered that it was unreasonable. They assumed this burden. They offered in evidence the testimony of McConnell taken before the *Commission,* and also had Mr. Robertson testify. The evidence of McConnell, the man familiar with the everyday work at the kilns, showed that it was wholly immaterial to the appellants which of the two tracks was extended, if one had to be extended. The testimony of the witness not so familiar with the method of carrying on the work at the plant was to the effect that it would be more inconvenient to have track D extended than track C, because it was used more. This is the whole case of the appellants on this point, aside from the evidence tending to show what damages the appellants would suffer if their loading tracks were interfered with. On this state of the evidence the trial court refused to hold the order of the *Commission* unreasonable, and on such evidence this court reverses the trial court and the *Commission.* I do not desire to make further comment than to say that I cannot agree with the conclusion reached by this court, and that I deem it a misfortune to have the work of this important *Commission* hampered by what looks to me to be an unreasonable interpretation of the

law. In ordering the service asked for, the *Railroad Commission* was carrying out a legislative function pure and simple. By exercising its power of investigation it could determine the reasonableness of the service demanded much more intelligently than the legislature itself could. Where no positive law is violated by the *Commission,* its decision as to what is reasonable should be entitled to as much respect in the courts as would the decision of the legislature itself, and it would have to be a clear case indeed that would warrant the courts in overturning an act of the legislature because it was unreasonable. Subd. *c,* sec. 16, ch. 362, Laws of 1905, places the burden of proof on the appellant to show that the order is unreasonable. Not only this, but it requires that unreasonableness be established by clear and satisfactory evidence as a condition precedent to the right to have the order declared void. It seems to me that the evidence tending to establish the unreasonableness of the order in question falls far short of being either clear or satisfactory. In fact, I think the evidence preponderates in favor of the finding of the *Commission* and that of the trial court.

So it seems to me that the case should be disposed of on its merits and that the court should either hold that any order providing for the extension of track D would be unreasonable and unlawful and could not be sustained, or that the record does not affirmatively show that the order under attack was unreasonable. I think the appellants were given an opportunity to be heard and were heard in reference to the extension of track D. If this were not so, they were fully advised of the proposed extension of track C and were fully heard in reference thereto, and on their own showing on the trial it was immaterial which of the two parallel tracks located a few feet from each other was extended. As I view the case the judgment should be affirmed.

SIEBECKER, J. I concur in the foregoing opinion of Mr. Justice BARNES.

DOHR, Administrator, Respondent, vs. WISCONSIN RAILWAY COMPANY, Appellant.

October 25, 1910—January 31, 1911.

Railroads: Death of servant: Comparative negligence: Qu jury.

1. In an action against a railroad company for the deatl tion foreman who was killed in a collision between h and a train, the negligence of decedent and that of the both of which contributed to the accident, are *held* up dence to have been ordinary negligence only.
2. In such a case, under sec. 1816, Stats. (Laws of 1907, ch trial court must ascertain and decide whether anythi evidence would authorize the jury to find that the neg the engineer was greater and contributed in a greater cause the injury than that of the decedent.
3. In all cases in any wise doubtful those questions shou mitted to the jury.
4. In ascertaining whether the negligence of one is gre that of another the court is to consider that care mu portionate to the risks to be apprehended and guarde
5. Negligence of the injurer may be held to contribute in degree to cause the injury where, other things being e negligence displays a greater lack of ordinary care of the injured person, or where the negligence of th person was only remotely or not at all the cause of h while the negligence of the other person was the p cause of the injury.
6. These comparisons are made not on the ancient classifi negligence into slight, ordinary, and gross, but by c the ordinary negligence of one with the ordinary negl the other and ascertaining which was the more culpat
7. It appearing in this case that each of the two servants of road company, the injured and the injurer, was of eq and authority in the management of the vehicle used trolled by him; that the responsibility resting on eacl safety and the safety of others was equal; that their o ties for anticipating and avoiding danger were equal; necessity for the injurer to continue his course without was more imperative; that the injured servant was req rules to exercise diligence to keep out of the way of the

and that the injury resulted from the collision of the two vehicles negligently moved in opposite directions to a meeting point on the same track, it cannot be said that the negligence of the injurer was greater than that of the injured, and there was no question in that respect for the jury.

WINSLOW, C. J., and SIEBECKER, J., dissent.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *John L. Erdall* and *W. A. Hayes,* attorneys, and *A. H. Bright,* of counsel, and oral argument by *Mr. Hayes.* They cited, among other cases, *Ives v. Wis. Cent. R. Co.* 128 Wis. 357, 107 N. W. 452; *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178, 22 N. W. 147; *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Zeratsky v. C., M. & St. P. R. Co.* 141 Wis. 423, 123 N. W. 904; *Boucher v. Wis. Cent. R. Co.* 141 Wis. 160, 123 N. W. 913; *Gumz v. C., St. P. & M. R. Co.* 52 Wis. 672, 10 N. W. 11; *Hinz v. C., B. & N. R. Co.* 93 Wis. 16, 66 N. W. 718; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764; *Owen v. Portage Tel. Co.* 126 Wis. 412, 105 N. W. 924; *Hackett v. Wis. Cent. R. Co.* 141 Wis. 464, 124 N. W. 1018.

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.* They cited *Bodenheimer v. C. & N. W. R. Co.* 140 Wis. 623, 123 N. W. 148; *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342; *Clary v. C., M. & St. P. R. Co.* 141 Wis. 411, 123 N. W. 649; *Zeratsky v. C., M. & St. P. R. Co.* 141 Wis. 423, 123 N. W. 904; *Louisville & N. R. Co. v. Melton,* 218 U. S. 36, 30 Sup. Ct. 676.

The following opinion was filed December 6, 1910:

TIMLIN, J. In this case the jury found the decedent and the defendant each guilty of negligence contributing to cause death, and that the negligence for which the defendant was responsible was greater than that of the decedent and contrib-

uted in a greater degree to the injury and death of decedent. The case is presented by counsel for the appellant describing the negligence of decedent as gross negligence or a very high degree of ordinary negligence, while the counsel for respondent minimizes this and contends that the facts show gross negligence on the part of the other erring servant of the appellant.

As we look at the facts neither of these contentions can be upheld. On a very dark, foggy morning on September 12, 1908, the decedent, section foreman for defendant, started out at 7 o'clock with another sectionman on his handcar bound west from Sherwood station to a point called High Cliff Junction, about one and one-half miles distant. Between Sherwood and High Cliff and a mile west of Sherwood there is a whistling post for that station; a quarter of a mile further west a highway crossing. The first regular train from the west was due at Sherwood at 7:42 o'clock that morning, and this would give the handcar time to reach High Cliff. Decedent went on the handcar at the usual hour of going to work in the discharge of his duty, and he had on the handcar some tools and implements and lunch pails and proceeded at a moderate rate of speed without stopping until the moment of collision, but looking and listening for an approaching train. Irregular trains were liable to be sent over this road at any time. The sectionmen were requested to look out for all passing trains and were furnished with time-tables of regular trains. The collision was with an irregular train. The verdict of the jury that the deceased was guilty of lack of ordinary care which contributed to cause his death is well supported on this evidence, but there was nothing of extraordinary recklessness in going out to work on a very foggy morning in this way. At 6:50 o'clock there left Menasha, or Menasha Junction, eastbound, a locomotive engine and caboose which collided with this handcar at a point about 4,000 feet west of Sherwood. There was evidence tending to show

[illegible] sound his whistle at the [illegible] crossing or at the mile-post [illegible] proceeding eastwardly [illegible] hour in this dense fog. [illegible] that the headlight of [illegible] accidentally extinguished [illegible] was not feasible to tell [illegible] on a foggy day whether [illegible] there was here no more [illegible] of speed was not un- [illegible] regular train in such a [illegible] some degree explained [illegible] determining the exact lo- [illegible] lack of headlight was [illegible] running ahead of the [illegible] measuring gross negli- [illegible] ary negligence against [illegible] negligence against ordi- [illegible] Was there, as required [illegible] the jury might say that [illegible] ghter than that of the [illegible] gineer contributed in a [illegible] to cause the death of [illegible] of the defendant was, [illegible] ch in good faith. The [illegible] inst an irregular train [illegible] escape and remove his [illegible] seeing the headlight. [illegible] pected to protect him- [illegible] might happen along. [illegible] al connection with his [illegible] nate cause. The engi- [illegible] ht be travelers making [illegible] on the track, and he [illegible] the crossing and at the

mile-post, and in case he could not see the crossing mile-post he should have sounded his whistle quite ously as a warning to sectionmen, and perhaps sho have decreased his speed to about that of an ordinary

When there is a collision between two vehicles trav opposite directions on the same track and the ordinar gence of the person in charge of each vehicle has ca collision and one of such persons is injured or kil court must, notwithstanding subd. 5 of sec. 1816 (1898), as amended by ch. 254, Laws of 1907, w point is properly raised, search the evidence and a whether anything appears from which the jury woul thorized to find that the negligence of the injurer was and contributed in a greater degree to cause the inju that of the injured servant. *Kiley v. C., M. & St. P.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. T interpretation was given to a similar statute, sec. 232 (1898), and cases in notes. In all cases in any wis ful the question should be submitted to the jury. Id.

In *Zeratsky v. C., M. & St. P. R. Co.* 141 Wis. 4 N. W. 904, it is recognized that the question whether ligence of the injured was slighter than that of the may be a question of fact or one of law. In case the e on this point is uncontroverted and permits of only on ence, it is for the court to decide this question. The ive negligences are not to be measured or compared by the old classification of slight, ordinary, and gro that case the plaintiff was a rear brakeman on a freig and omitted a duty imposed upon him by rule of his ment to go back and signal any oncoming train whene freight train stopped on the main track. But his s upon whom the heavy responsibility of the care of l property rested, the conductor who had charge of th had detached the locomotive, left the freight train, or it, standing on the main track, and departed for a

some distance ahead without even signaling to the plaintiff that the train was to make a stop. This was most culpable faithlessness and negligence in a trust involving the lives and safety of subordinates and endangering the lives of passengers on other trains. The train dispatcher was also negligent, and perhaps the conductor of the passenger train following the abandoned freight. Zeratsky attempted to excuse his delay in going back to signal the passenger train following. It was held that it was for the jury to determine whether the negligence of the other servants of the defendant was greater than that of the injured employee and contributed in a greater degree to cause his injury. *Boucher v. Wis. Cent. R. Co.* 141 Wis. 160, 123 N. W. 913, was a closer case on this question, but it was considered that there was evidence from which the jury was authorized to infer that the injured employee might have relied on the other negligent employee of higher rank and greater responsibility to properly respond to the signal given, and, so relying, stepped into a place, deadly if the other negligent employee did not properly respond to the signal given, but not so if the signal was properly responded to. The injurer negligently failed to properly respond to the signal given, and moved his engine further than was necessary while the injured servant was in a somewhat perilous position at the best and in a position calling for great care on the part of the engineer. It was held that whether the negligence of the engineer was greater and contributed in a greater degree to cause the injury was for the jury. In *Clary v. C., M. & St. P. R. Co.* 141 Wis. 411, 123 N. W. 649, the jury found the plaintiff not guilty of contributory negligence, thus making a verity of the lesser density of fog, the reliance on his superior, the impossibility of conforming to the rule, the abrogation of the rule by nonuser and consent, and all those facts which tended to support that finding. Here the finding of the jury is the other way and impels us to accept as verities the facts in evidence which support this finding.

In ascertaining whether the negligence of one is greater

than that of another we must keep in mind that care must be proportionate to risks to be apprehended and guarded against. "Yet the *degree* of care required is the same. In either case reasonable care, or what is the same thing, ordinary care, only, is required. The term 'reasonable care' has no fixed, definite signification, but is a relative term." *Read v. Morse*, 34 Wis. 315. If one messenger carry a bag of pennies to a bank and another a bag of gold, a higher degree of ordinary care would be exacted from the latter. *Ward v. M. & St. P. R. Co.* 29 Wis. 144; *Cayzer v. Taylor*, 10 Gray, 274. "Ordinary care must be measured by the character and risks and exposures of the business; and the degree [of ordinary care] required is higher when life or limb is endangered, or a large amount of property is involved, than in other cases." Id. "Care and diligence should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted." *Holly v. Boston G. L. Co.* 8 Gray, 123. Negligence of the injurer may be held to contribute in a greater degree to cause the injury where (other things being equal) such negligence displays a greater lack of ordinary care than that of the injured. So, even if there was lack of ordinary care on the part of the injured but his delinquency in this respect was only remotely or not at all the cause of his injury, while the negligence of the other servant was the proximate cause of the injury. *Clary v. C., M. & St. P. R. Co.* 141 Wis. 411, 123 N. W. 649. In an extreme case, cited here merely for illustration, it has been held as matter of law that the negligent act does not in any degree cause or contribute to cause an injury where the person responsible for the act because of the technical knowledge or skill of those exposed to injury could not reasonably have expected that any of them would be thereby injured. *Huber v. La Crosse City R. Co.* 92 Wis. 636, 66 N. W. 708. Likewise, negligence on the part of the plaintiff does not contribute to cause his injury unless it has the same causal relation

to his injury as is required of the negligence of the defendant in order to hold the latter liable. There are many cases which disclose comparisons in the degree of ordinary care required and in the degree in which lack of ordinary care contributed to produce an injury. *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *Stucke v. M. & M. R. Co.* 9 Wis. 202; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446. The questions must be met and decided under this statute as they arise, and in time rules will be evolved from such decisions. Whether the plaintiff's negligence was slighter than that of the other person charged, and whether the negligence of the latter contributed in a greater degree to produce the injury, must ordinarily be questions for the jury. These questions can only be taken from the jury where there is a total lack of evidence to support a finding that the negligence of the plaintiff was slighter, or a total lack of evidence to support a finding that the negligence of the other person contributed in greater degree to the injury. For the instant case it is enough to say that here each servant of the railroad company, the injured and the injurer, was of equal rank and authority in the management of the vehicle used and controlled by him. The responsibility resting on each for his safety and the safety of the group co-operating with him and for the safety of the other negligent servant and his co-operating group and for the safety of passenger trains was at least equal. The opportunities for anticipating and avoiding danger were at least equal. The necessity for the injurer to continue his course without stopping was more imperative. The rules of employment required the injured servant to exercise diligence to keep out of the way of the injurer. The actionable fact, death, resulted from the collision of the two vehicles, the simultaneous and indivisible result of two vehicles negligently moved in opposite directions to a meeting point on the same track. Ordinary care on the part of the injured servant in the very particular in which the jury must have found him negligent would have avoided the injury, notwith-

standing the negligence of the injurer. The culpability of the injurer in forgetting or failing to blow his locomotive whistle more frequently as a warning to the trackmen was equal to the culpability of the injured in taking out his subordinate on a handcar and proceeding along the track in the unusual fog when a train might be expected to move down upon them. We may presume the injured relied on his ability to get out of the way after hearing the whistle, and the injurer on the rule of the employment that the injured must keep out of the way of trains. Under such circumstances there is no evidence from which a court or a jury can say that the negligence of the injured was slighter than that of the injurer. The judgment must therefore be reversed. This makes it unnecessary to decide whether in the instant case there was any evidence from which the jury might infer that the negligence of the injurer contributed in a greater degree than the negligence of the injured to cause the injury. Whether the jury could consider the greater weight and impact of the locomotive as a more potent cause of the injury and thus contributing in a greater degree, or the failure to sound the whistle as expected, and the tendency of such failure to induce the injured servant to continue in his careless course on the track, or the more imperative duty to continue resting upon the injurer, or the rule of the railroad by which the injured was informed that he must rely on himself to keep out of the way of trains, as bearing on this second requirement of the statute, need not be decided.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for defendant.

The following opinion was filed January 6, 1911:

WINSLOW, C. J. (*dissenting*). As I see this case duty compels me to dissent.

When two persons are negligent and injury to one proximately results from the combined negligence of both, it must

often be a very delicate and difficult question to decide whether the negligence of one was greater than that of the other and contributed in a greater degree to produce the injury. There is no yardstick with which to measure the two acts of negligence, nor scales with which to weigh them. However, the legislature has determined that in certain classes of cases this delicate question shall be decided and that upon its decision shall depend liability, and this court has sustained and applied that law. It is not inherently more difficult to decide than many another question which courts and juries are daily compelled to decide. It is said in the opinion of the court that these questions must ordinarily be questions for the jury, and that they "can only be taken from the jury where there is total lack of evidence to support a finding that the negligence of the plaintiff was slighter, or a total lack of evidence to support a finding that the negligence of the other person contributed in greater degree to the injury."

With this proposition I entirely agree, but I do not regard it as a complete statement of the legal principles which bear upon the questions in this case.

Negligence "is not a fact to be testified to, but can only be inferred from the *res gestæ*—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact to be drawn by the jury under proper instructions from the court. It is always so where the facts, or rather the conclusion, is fairly debatable or rests in doubt." *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489.

To draw this inference of fact from all the circumstances in evidence has been frequently said by this court to be "peculiarly the function of the jury." *Bohan v. M., L. S. & W. R. Co.* 58 Wis. 30, 15 N. W. 801; *Fitts v. Cream City R. Co.* 59 Wis. 323, 18 N. W. 186.

It has been also called a mixed question of law and fact, which is never taken from the jury except in very clear cases. *Pool v. C., M. & St. P. R. Co.* 56 Wis. 227, 14 N. W. 46.

The question whether the negligence, if any, is t mate cause of the injury complained of is also an inf fact, which is under all ordinary circumstances prope ference to be drawn by the jury. *Atkinson v. Goc Co.* 60 Wis. 141, 18 N. W. 764. If the inferences gence and proximate cause are peculiarly inferenc submitted to the jury, it seems to me to follow ne that the inferences as to the *quantum* or extent of t gence on each side and the degree to which it proxima tributed to bring about the injury must fall within t rule. They cannot be properly taken from the jur in very clear cases where unprejudiced and reasonabl can come to but one conclusion. In all cases where t are numerous, the evidence contradictory or involved, conclusions in any degree doubtful, the proper infer all of these propositions must be for the jury.

In the present case it seems to me there are unques facts from which reasonable minds might draw differ clusions both as to the *quantum* of negligence on each as to the degree in which such negligence proximat tributed to cause the injury.

The deceased and his comrades were going to their their duty required, and they were going in the way tl expected to go. The evidence tends to show that th proceeding slowly and carefully; their car was li could be quickly stopped and lifted from the track out ger; they knew that no regular train was due; they al there were two or three highway crossings directly a them as well as a station whistling post, and that proaching locomotive was required to whistle at all places.

On the other hand, the engineer of the approachin knew that he was running wild; he knew, or shou known, that sectionmen would probably be on their work; he was driving his engine through the fog at a

over twenty miles an hour without whistling at the road crossings; he was in charge, not of a light vehicle which could be stopped in few feet distance and taken from the track, but of a ponderous mass of steel and iron which was hurtling over the rails at a speed which rendered it impossible of ready control, and which would probably deal death and destruction to any one rightfully on the crossings or on the track who did not know of its approach till it emerged from the fog. Knowing all these things, he sounded no whistle and came upon the deceased and his fellow workmen with his engine of death like a ball shot from a cannon.

Grant that it must be said that the deceased and his colleagues were guilty of negligence, is there no room upon these facts for a reasonable mind to conclude that the negligence of the engineer was not only greater but contributed in a greater degree to the injury? I think there is ample room for such a conclusion, and so thinking I cannot agree with the result reached by the court in this case.

I am authorized to state that Mr. Justice SIEBECKER agrees with the views expressed in this opinion.

A motion for a rehearing was denied January 31, 1911.

TOWN OF LAWRENCE, Respondent, vs. AMERICAN WRITING PAPER COMPANY, Appellant.

October 26, 1910—January 31, 1911.

Equity: Injunction: Laches: Mills and milldams: Rights of flowage: Riparian rights: Erosion of banks: Highways.

1. Where, by user during more than forty years, a town acquired a prescriptive right to maintain a highway on a bank of a river, but during the same period recognized and acquiesced in the right of the owners of a lawful milldam lower down on the stream to maintain such dam at substantially the same height and to keep the water adjacent to the highway at about the

same level, large sums being expended by such owne
strength of their belief that they could continue su
the water power, the town is not entitled to equitable
straining the mill owners from maintaining, by the us
boards on the dam, substantially the same conditions
isted during the period mentioned, especially where t
to the town is slight and the loss to the mill owners
comparatively large.

2. Acts of the town twenty-two years before commencing t
and again four years before the action, in moving
highway, without protest, because of the erosion of
theretofore caused by the water, showed conclusively tl
ognized the right of the owners of the water power to
the water at its then level, and acquiesced therein.

3. The owner of water power has a right, the whole year
the use of the stream and the banks below ordinary h
mark as nature created them, subject to a reasonable us
by other owners of power and of riparian rights; and
in a season of low water, by artificial means restore t
to a higher stage, provided he does not raise it above
high-water mark, and provided such restoration is re
necessary to the full enjoyment of his water rights an
no essentially different conditions from those which w
vail were the rise of the stream a natural one.

4. A mere riparian right is subject to reasonable use of th
for power purposes, and if any damage results therei
owner of the right is without remedy.

5. The owner of a water power whose use of the water is la
usual cannot be held liable for damage done to a hig
located on the edge of a stream above his dam that som
thereto by the waters of the river is natural and inevit
though the damage is increased by the combined action
proprietors in periodically shutting off the flow of the
the lower owner in then ponding it, and of nature in
and expanding it under such changing conditions, togeth
the natural stage of high water in the spring when th
carried away.

APPEAL from a judgment of the circuit court for
county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This is a suit in equity praying for a perpetual inju
to restrain the defendant from maintaining flush-board
the crest of a dam across the Fox river at De Pere, Wis

and demanding damages for an injury to a highway claimed to have been caused by reason of the use of such flush-boards.

The defendant owns a paper mill on the west bank of the Fox river at De Pere that requires about 1,800 horse power for its operation. The plaintiff town has for more than forty years maintained, and now maintains, a highway by user, which, at about five and two-thirds miles above defendant's dam, in places borders directly upon the bank of the river. In such places the surface of the ground is but a little above the level of the water; but the shore is marked by a perpendicular bank below which is a beach, exposed at low water and covered up to the bank at high water. About twenty-two years ago, owing to the gradual erosion of the bank by the water, the highway in some places was moved back from the bank; and four years ago it was again moved back still further.

As early as 1837 a dam was built across the river at or about the location of the present dam. This dam was rebuilt in 1849, and prior to 1872 the United States government purchased the dam and assumed its control and management. Between 1872 and 1874 it built a new dam a few feet south of the old one and practically of the same height. Owing to the fact that it was tighter, it held the water back at a little higher level than the old one did. The government permits the water to flow over the crest of the dam to a height of two feet before it opens the flood-gates, and then it does so in order not to subject the dam to too great a pressure. It does not permit the water to be drawn off for power purposes lower than the crest of the dam. The east end of the defendant's dam connects with the government dam, and since it began to operate its mill in 1892 it has in times of low water maintained flush-boards upon its own dam and later upon the government dam under a license from the United States relieving the latter from any liability on account of the use of such flush-boards. When the water is eighteen inches or

more above the crest of the dam, flush-boards are n
mitted to be used.

Since 1874 there has existed a number of mills at N
Appleton, Kaukauna, and other points on the river,
water power. These mills shut down from Saturday e
until Monday morning, and when so shut down they h
water back to such an extent that during Mondays and
Tuesdays it is so low at De Pere that defendant canno
from the reservoir sufficient to run its mill without d
the water below the crest of the dam. To overcome th
dition as far as possible, it has, during all the time that
run its mill, when the flow of the water was so small as
quire it, used flush-boards on the dam, some eight and
twelve inches high, the effect of which has been to rai
average water level of the reservoir about ten inches abo
level maintained prior to 1892, during low stages of wa

There has been considerable fluctuation in the flow
river, and the water was higher on the crest of the dam
of the time annually when there were no flush-boards
than during the time when flush-boards were used.
time has the use of flush-boards caused the water to ov
the river bank where the highway borders on it. Wh
water is at the crest of the dam it does not cover the sh
beach nor reach the bank along the highway. Whe
water is eighteen inches above the crest of the dam it re
the bank on which the highway borders; but even when
two feet high on the crest of the dam it does not overflo
bank.

The bank on which the highway abuts has not been w
away by a swift current, but by the joint action of ic
water. It is claimed that the river freezes when the wa
at a high stage. When the water falls, the ice cracks
parts not far from the shore. The space thus opened
with water and freezes again, thus extending the width o
ice. When the water again rises, the ice is forced agains

bank, raises it up and breaks its edge, and when the ice moves out with the high water in the spring the loose dirt is washed away. This action is caused mainly by the holding back of the water over Sunday by the mills above.

Such washing away of the bank took place before 1892 as well as since, but by reason of the maintenance of the higher level it has worn away with greater rapidity since 1892. A washing away of the bank would have taken place had the defendant made no use of the water at De Pere and had the United States government continued to use its dam with the depth of water at its crest from nothing up to two feet, but such washing away would have been appreciably less in extent had no flush-boards been maintained.

By reason of the use of the flush-boards and the higher level maintained at times, the plaintiff has been damaged in the sum of $257. It does not appear that the right of maintaining a flowage level of two feet above the crest of the dam has been exercised either by the defendant or the government of the United States for more than twenty years next preceding the commencement of this action.

The trial court held that plaintiff was entitled to a permanent injunction as prayed for and damages as found by it. From a judgment entered accordingly, the defendant appealed.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *S. H. Cady* and *L. D. Jaseph.*

The following opinion was filed November 15, 1910:

VINJE, J. 1. It appears from the foregoing statement of facts that for more than forty years the town has maintained a highway by user along the bank of the Fox river; that at least since 1849 a dam has been maintained at the place in question of substantially the same height as the present one;

and that owing to the fluctuations in the flow of the r
water was higher more of the time annually when the
no flush-boards on it than during the time when flush
were used. It is apparent, therefore, that the town a
its prescriptive right to the highway by user conc
with, if not subject to, the right to use the river lawf
power purposes, and that it has until very recently
tinued to regard and hold such right. Both parties
that the present dam is a lawful structure, and no c
made but that the dams previously built were also
structures. We have, therefore, this situation: Af
lapse of more than forty years, during which time th
has recognized and acquiesced in the right of the de
and its predecessors to use the water as it has been
now for the first time comes into a court of equity a
that defendant be restrained from maintaining, by the
flush-boards, conditions in no material respect differer
those that have existed during all of that time.

About twenty-two years ago, long before the def
owned its mill, the town moved the highway back bec
the erosion theretofore caused by the water, and agai
years ago it moved it still further back owing to th
cause. These acts show conclusively that the town reco
the right of the owners of the power to maintain the w
its then level and that it acquiesced therein. The defe
when it bought its power, had a right to rely on the fa
conditions so long maintained without protest would l
mitted to remain substantially unchanged in future. I
all of this time the town stood idly by and permitted
sums of money to be expended by the defendant c
strength of its belief that it could use its power and the
of the river as they had been used in the past. Should p
iff at this late day, because during a period of six years
suffered damages to the extent of a few hundred dolla
adjudged entitled to restrain the defendant from the

flush-boards and deprive it of power which in weekly, if not daily, value no doubt exceeds the yearly damage? It seems that under such circumstances the court ought not to grant the relief. To do so would not be doing equity but a gross injustice. If plaintiff ever had any rights, it has slept upon them too long to entitle it to come into a court of equity and obtain the desired relief. *Coon v. Seymour,* 71 Wis. 340, 37 N. W. 243.

2. Has the defendant by the use of its flush-boards so manipulated the water as to incur any liability to plaintiff? The flush-boards have been used on the dam only when the water was at a low stage, caused either by natural conditions or by the holding back of the water by upper mill owners. At no time has the use of flush-boards caused the river to rise above ordinary high-water mark, that is, the point up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of vegetation, or other easily recognized characteristic. The water has always been controlled within the natural limits of the stream and within the limits of its ordinary high and low water marks, and such control has been rendered necessary by the lawful and proper use of the water by upper proprietors of mills or by natural causes. Such use, within such limits and under such circumstances, is a lawful use. The owner of water power is entitled the whole year round to the use of the stream and the banks below ordinary high-water mark as nature has created them, subject to a reasonable use thereof by other owners of power and of riparian rights. And he may in a season of low water, by artificial means, restore the stream to a condition of a higher stage of water than then exists, provided he does not raise it above ordinary high-water mark and provided such restoration is reasonably necessary to the full enjoyment of his water rights and it creates no essentially different conditions than would exist had there been a natural rise of the stream to the same extent and for the same

length of time. A mere riparian right is subject to su sonable use of the stream, and if any damage results from the owner of the right is without a remedy. 2 ham, Waters, § 476; Gould, Waters, § 218; *Timm v.* 29 Wis. 254; *Coldwell v. Sanderson,* 69 Wis. 52, 28 232, 33 N. W. 591.

The defendant made no new or unusual use of the s nor did it create conditions essentially different from that would have resulted from the upper proprietors h the water back at stated intervals without any ponding t on its part. The intermittent breaking and freezing ice from which the greater damage resulted was cau much by the action of the upper mill owners as it was b of the defendant; and it is a verity in the case that some age would have been done to the highway if neither the proprietors nor the defendant had manipulated or cont the water in any respect. The location of the highwa reference to the river was such that the damage sust might be said to be a natural and necessary incident th It was the combined action of the upper proprietors in odically shutting off the flow of water, of the defenda then ponding it, and of nature in freezing and expand under such changing conditions, together with the na stage of high water in the spring when the ice was ca away, that caused the damage. Under such circumst the defendant, whose use of the water was lawful, cann held liable.

By the Court.—Judgment reversed, and cause rema with directions to dissolve the permanent injunction and der judgment for defendant.

A motion for a rehearing was denied January 31, 191

ZOHRLAUT, Appellant, vs. MENGELBERG, Respondent.

November 17, 1909—January 11, 1910.
October 29, 1910—January 31, 1911.

Contracts: Construction: Corporations: Sale of shares: Appeal: Affirmance on equal division of justices: Judgment: Opening case for further defense.

Plaintiff agreed in writing to sell to defendant on November 30, 1899, "twenty-five shares of the five hundred shares of the capital stock" of a corporation at the book value at that date, payment to be secured by defendant's notes with the stock as collateral, and that if at any time defendant should cease to be a director and officer of the corporation plaintiff would repurchase said twenty-five shares at the book value at the time of repurchase, deducting any amount unpaid on the notes. Five hundred shares were then outstanding, of the par value of $1,000 each, being the full authorized capital stock of the company. Afterwards a certificate for 174 shares was canceled, so that the outstanding capital stock was $326,000. On November 30 the books showed that on the basis of $500,000 the shares were worth about ten or twelve per cent. above par, and on the basis of $326,000 were worth about forty or fifty per cent. above par. Thereafter the parties made a new contract by which plaintiff agreed to employ defendant at a salary for five years as a director and officer of the company and, "in accordance with the terms of the" previous agreement, to sell to defendant twenty-five shares of the capital stock of the company at par, accepting defendant's note in payment as before provided. Accordingly twenty-five shares were sold and delivered by plaintiff to defendant, and defendant gave therefor his note for $25,000, with the stock as collateral security. After the five-year term of service defendant ceased to be a director and officer of the company. Plaintiff brought this action upon defendant's note. Defendant counterclaimed for the book value of the twenty-five shares of stock at the time he ceased to be director, and recovered judgment for the excess of such value over the amount due on the note. On appeal, upon the foregoing and other facts, the question being whether the agreement should be construed as being for the sale of a one-twentieth interest only in the corporation, so that after the reduction of the outstanding stock to 326 shares the sale was of one twentieth of that number only, this court at first decided against such construction (MARSHALL

and KERWIN, JJ., dissenting), but afterwards, on a re
divided equally—WINSLOW, C. J., and BARNES and VI
adhering to the former opinion, MARSHALL, SIEBECKER,
WIN, JJ., holding the contrary view, and TIMLIN, J., ta
part; and the judgment of the trial court was therefore

Per MARSHALL, SIEBECKER, and KERWIN, JJ., it is s
that this court has power and, under the circumstance
to send the cause back to the trial court with authority
cretion and upon proper terms, to open the case so as t
plaintiff to interpose an equitable defense to the count

APPEAL from a judgment of the circuit court for M
kee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The Herman Zohrlaut Leather Company was incor
in 1891 under the laws of Wisconsin and with an aut
capital stock of $500,000. Prior to the incorporation
company Herman Zohrlaut had been engaged for man
in the tannery business, which the corporation was or
to carry on, and had been the principal if not the sole
of such business. The corporation was practically a
affair. Prior to June 19, 1899, Herman Zohrlaut had
transferred to the corporation the real estate, machine
buildings used in connection with the business. The
of these three items of property, as shown on the balanc
of the corporation for November 30, 1899, was $508,8
It appears that an appraisal of the buildings and fa
had been made by the American Appraisal Company,
did not agree with the book values, but was in excess t
Entries were made in the books of account under date
vember 30th to make the book values of these properti
respond with the values placed thereon by the appraisa
pany. On the other hand, the real estate values as carr
the books were somewhat reduced. These changes resul
increasing the book value of these items of property $8
It further appeared that the corporation was a large bor
and that in the statement which it made to banks as a
for credit the real estate, buildings, and machinery were
as part of the assets of the corporation.

On June 19, 1899, a meeting of the stockholders of the company was held at its office, and minutes were made of what transpired at such meeting, which minutes were subsequently changed, as will be hereafter indicated. It appeared from such minutes that Herman Zohrlaut was given permission to sell his stock in the corporation to *Edward Zohrlaut,* and it was further provided that the books of subscription of the capital stock of the company be opened and kept open long enough to receive subscriptions to the amount of the unsold stock, to wit, the sum of $174,000, and the board of directors was authorized to issue such stock in its discretion. The directors were authorized and empowered to purchase from Herman Zohrlaut the tannery, real estate, property, buildings, and machinery for the sum of $500,000, to be paid for by issuing to said Herman Zohrlaut $174,000 of the capital stock of the company and the balance in cash, upon his conveying said property by warranty deed to the corporation. At a meeting of the directors of the corporation held immediately thereafter a motion was carried to the effect that the purchase of the tannery property, pursuant to the resolution of the stockholders passed at their meeting, be ratified, and the vice-president and secretary were authorized to issue to Herman Zohrlaut, in payment of the purchase referred to in said resolution, the sum of $500,000, of which sum $174,000 was to be paid by the issue of the capital stock of the company to that amount, and the balance in cash.

It is fairly apparent from the testimony that the company's financial condition at this time was such that it could with difficulty, if at all, make the cash payment. A warranty deed of the real estate, buildings, and machinery in question, bearing date January 1, 1899, was executed by Herman Zohrlaut and wife to *Edward Zohrlaut* as grantee. This deed appears to have been acknowledged as to Herman Zohrlaut on June 19 and as to his wife on July 5, 1899.

The next meeting of the board of directors of the corporation was held on August 18th. The entries relating to what transpired at that meeting were substantially changed, as were the entries relating to the meeting of June 19th. The original entries noted the fact that the sale of the property from Herman Zohrlaut to the corporation, as contemplated by previous resolutions, had been consummated, but it was discovered that the deed was made by Herman Zohrlaut to *Edward Zohrlaut* instead of to the company, and recited that it was thereupon agreed that *Edward* and his wife should quitclaim to the company. *Edward Zohrlaut* and wife did in fact execute a quitclaim deed to the corporation of the property conveyed to him by his father, such deed bearing date August 16, 1899.

The stock book of the corporation shows that on June 18, 1899, a certificate for 174 shares of the capital stock was made out to Herman Zohrlaut, he signing it as president, and that such certificate remained in existence until September 14, 1899, at which time the court found that it was canceled. Entries had also been made in the books of the corporation showing that the outstanding capital stock thereof was $500,000, in lieu of the $326,000 that had been outstanding prior to the issue of the last-named certificate. Whether there had been any delivery to or acceptance by Herman Zohrlaut of the certificate in question, as part payment of the purchase price of the property sold, there is no dispute that the cash part of the payment never was paid. The referee and the court found that, concurrently with the stockholders' meeting of June 19th, *Edward Zohrlaut* purchased from his father the latter's entire holdings in the corporation, and also purchased from him the property covered by the warranty deed dated July 1st, and that such deed was executed and delivered in pursuance of such agreement to purchase, and not for the purpose of carrying out the alleged agreement

with the corporation, and that no mistake had been made in naming *Edward Zohrlaut* as grantee in such deed instead of the corporation.

Under date of August 22, 1899, the following contract was made and entered into between the plaintiff and defendant:

"*Edward Zohrlaut,* president of the Herman Zohrlaut Leather Company, and *Rudolf Mengelberg* agree to the following:

"(1) As soon as the books of the Herman Zohrlaut Leather Company are closed for the year ending November 30, 1899, *Edward Zohrlaut* sells to *Rudolf Mengelberg* twenty-five shares of the five hundred shares of the capital stock of the Herman Zohrlaut Leather Company at a price based on the showing of the Herman Zohrlaut Leather Company's books on November 30, 1899.

"(2) *Rudolf Mengelberg* secures the payment of said shares by his notes. These notes shall bear interest at the rate of four per cent. per annum, provided that the yearly dividend earned and declared on said shares be larger than the yearly interest due on said notes. If the yearly dividend earned and declared on said shares be less than the yearly interest due on said notes, then the notes shall earn said dividend in place of interest for such year. Such stock to be held by said *Zohrlaut* as collateral for the payment of such notes.

"(3) All money earned and declared as yearly dividends on said shares in excess of the yearly interest due on said notes shall be applied towards paying off the principal of said notes.

"(4) If at any time *Rudolf Mengelberg* should not be reelected as director and officer of the Herman Zohrlaut Leather Company, or for other unforeseen reasons be compelled to resign his position, *Edward Zohrlaut* agrees to purchase from *Rudolf Mengelberg* said twenty-five shares at a price based on the showing of the Herman Zohrlaut Leather Company's books at that time, deducting therefrom any unpaid principal and interest on such notes."

An informal meeting was held in the office of the legal adviser of the corporation on October 4, 1899, at which meeting

plaintiff and defendant were present. The plaintifl time held a large majority of the capital stock of the tion and habitually represented some of the other st ers by proxy, and it was found by the referee and by t that the proceedings taken at such meeting amounte porate action, and that at such meeting it was conclud duce the outstanding capital stock of the corporatic $500,000 to $326,000, and to cancel the certificate issued to Herman Zohrlaut for $174,000, and to trans sum to the surplus account of the company instead o ing it as a stock liability. It was also found that agreed at said meeting that the minutes of the two meetings should be changed in so far as it might be ne to meet the situation, and changes were made therei by the attorney for the corporation or by his clerk.

The minutes of the meeting of June 19th were cha as to show that, instead of partial consideration for t chase of real estate, buildings, and machinery being suance of $174,000 of the capital stock of the corpo such consideration was the cancellation of the indebt amounting to $48,415.84, against *Edward Zohrlaut.* cil mark was drawn through the portion of the resoluti viding for the issuance of $174,000 of the capital st Herman Zohrlaut, and in lieu thereof the vice-preside secretary were authorized to cancel the $48,415.84 a against *Edward Zohrlaut* in consideration of his con the tannery property to the corporation, and in furthe sideration of the company's assuming payment of inte the note or notes of *Edward Zohrlaut* to Herman Zol It appeared at this time that *Edward Zohrlaut* had pur the stock of Herman Zohrlaut in the company, and had his note to Herman Zohrlaut for $100,000 in whole or p payment therefor.

The minutes of the meeting of August 18th were ch so as to strike out the recital therein that it was disco

that the deed given by Herman Zohrlaut to *Edward Zohrlaut* was given by mistake and that it was intended that the corporation should be named as grantee therein.

At the time the meeting of October 4th was held one share of stock in the corporation was assigned to the defendant and he was elected a director of the company and began his employment on or about that date. On November 30, 1899, the books of the company showed that this stock, on the basis of an issue of $500,000, was worth approximately ten or twelve per cent. above par. On the basis of outstanding stock to the amount of $326,000 the books showed the stock to be worth some forty or fifty per cent. above par. The balance sheet of November 30th showed an outstanding liability in the way of a credit on open account to Herman Zohrlaut of nearly $40,000. This amount thereafter was charged off without any payment, and the surplus of the company was correspondingly increased. Such balance sheet also showed a surplus, after deducting profit and loss account, of substantially $57,000.

The referee found that the certificate for 174 shares of the capital stock of the corporation had in fact never been issued, but that, if it had, such certificate was assigned to the plaintiff by his father, and was surrendered for cancellation by the plaintiff and was canceled, and that such surrender and cancellation was ratified by the corporation; and the court confirmed such finding.

The balance sheet taken from the books of the corporation under date of November 30th showed an outstanding stock liability of $500,000 and a surplus amounting to $57,143.92. On the same day this surplus was increased $213,774.98 by entries made in the books by defendant, making the total surplus, after such changes were made, $270,918.90. The referee and the court found that such changes were made at the suggestion of the plaintiff and with his knowledge and consent. Such increase was made by reducing the stock liability

$174,000 and crediting such amount to surplus, by off an outstanding account in favor of Herman amounting to $38,917.22 and crediting such amoun plus, and by making a net increase of $857.76 in value of the real estate, buildings, and machinery, wl was likewise credited to surplus.

Thereafter the following contract was entered into the parties:

"The following is the agreement made and concl and between *Edward Zohrlaut* and *Rudolf Mengelbe* of the city of Milwaukee, county of Milwaukee, and Wisconsin, this first day of December, A. D. 1899.

"Witnesseth, that the said *Zohrlaut* agrees to em said *Mengelberg* for the term of five (5) years fro ary 1, 1900, as one of the directors and such office board of directors shall during said term by vote de of the Herman Zohrlaut Leather Co., at the following namely: for the year 1900 at the rate of four thousand dollars per annum; for the year 1901 at the rate o five hundred (4,500) dollars per annum; for the yea 1903, and 1904 at the rate of five thousand (5,000) per annum; such salary payable in monthly instalm the end of each month during said term.

"And the said *Zohrlaut* further agrees in accordan the terms of the agreement entered into between the heretofore on August 21, 1899, to sell to said *Men* twenty-five (25) shares of the capital stock of said I Zohrlaut Leather Company at par, accepting in lieu the note or notes of said *Mengelberg* for the term of f years from this date with interest at four (4) per ce annum, payable in the manner and in accordance wi agreement.

"And the said *Mengelberg* does hereby on his part a devote his entire time, skill, ability, and energy to the of his power for the use and benefit of said Herman Z Leather Co.; and that he will not, during the term af engage in, or carry on, or become interested in any othe ness except his employment by said company in the ca hereinbefore mentioned and at the salary aforesaid;

further agrees to comply with the agreement dated August 21, 1899, aforesaid, on his part to be performed, and that he will not sell, hypothecate, nor pledge the said stock, or any interest therein, to any person or persons without the written consent of the said *Zohrlaut* first had and obtained."

The testimony showed and it was found that this contract was in fact executed some time after January 1, 1900.

The defendant continued in the employ of the corporation under said contract until December 31, 1904, at which time his services were dispensed with. During the period of defendant's employment no dividends had been declared, and the net surplus of the company had been reduced in the sum of $43,700.89. Not all of this reduction, however, was due to losses in the business during this time, if in fact any of it was. Some bad accounts had been charged off; some interest had been paid by the corporation for plaintiff; and an account of the corporation against the plaintiff had been canceled.

When the defendant left the employ of the plaintiff he took with him the stock which he had purchased, and which the contract provided should be left with the plaintiff as collateral security for the payment of the note given in pursuance of the terms of the contract, and plaintiff was obliged to commence an action of replevin to recover the possession of such stock. Thereafter the plaintiff brought this action to recover from the defendant the sum of $25,000 alleged to be due upon the note. The defendant counterclaimed in the action for the amount of the book value of his stock, as of December 31, 1904, over and above the sum of $25,000 due on the note. The trial of the action resulted in an affirmative judgment in favor of the defendant for $14,312.50 damages, together with interest and costs, from which judgment this appeal is taken.

For the appellant there was a brief by *Nath. Pereles & Sons,* attorneys, and *Quarles, Spence & Quarles* and *Glicksman, Gold & Corrigan,* of counsel, and oral argument by *W. L. Gold* and *T. W. Spence.*

For the respondent there was a brief by *Winkler, Bottum & Fawsett,* and oral argument by *J. G. Fla C. F. Fawsett.*

The following opinion was filed January 11, 191

BARNES, J. There is ample evidence in the reco port the finding of the referee to the effect that if the tificate for $174,000 had ever been issued it was su and canceled prior to December 1, 1899. Whether any valuable consideration to support such a tran more debatable. The argument of defendant's cou the cancellation of a debt amounting to about $48 the assumption of certain interest obligations by the tion constituted a good consideration, is not conv view of the fact that the plaintiff turned over $326,0 of other property to the corporation and assumed an ness to his father of over $38,000, for which no cons was paid except the settlement of the account referr the interest agreement. However, the question is ticularly material. The plaintiff might make a do a portion of his stock to the corporation in this case fit, and the important fact is that he did surrender and that it ceased to be a corporate liability on named.

We find little in the way of evidence, or of infere drawn therefrom, to justify the contention that d took a decaying business and built it up. The evide to show insolvency or anything approaching it whe fendant bought in, and it is difficult to discover where his five-year term of service, he left the business in m ter condition than he found it. The only thing to that he found nominal book assets and left actual on fact that some bad accounts were charged off the bo the amount was inconsiderable, and the net assets some $43,000 during the period of his service. The

off of the account standing on the books against the plaintiff, and the assumption by the corporation of interest charges on the individual debt of the plaintiff, affected the showing made by the business while defendant had charge of it, but, considering its magnitude, about all that can be said for it is that it held its own.

It seems clear that when the parties made the contract of August 22d, by which plaintiff agreed, on the happening of a certain contingency, to repurchase the stock which defendant agreed to buy, the parties contemplated that if the business proved to be profitable and the surplus was increased by legitimate earnings during the term of defendant's employment, the latter should be paid his *pro rata* share of the increase, and that if loss resulted he should suffer his *pro rata* share of such loss. The net surplus of the corporation was increased on November 30, 1899, $213,774.98 by entries made in the books of account. This increase did not add a single dollar to the financial strength of the corporation, unless the wiping out of the account of $38,917.22 in favor of Herman Zohrlaut reduced its indebtedness to that extent, and it is not at all certain that Mr. Zohrlaut ever agreed to forego his claim against the corporation for this sum. It seems highly improbable that the plaintiff understandingly signed the agreement of December 1st with a full realization of the consequences that might result from such action. The defendant paid par for $25,000 of the capital stock of the company. Had he been taken ill with some malady that would prevent his performing the work required of him by the contract, the next day after its execution, he would be entitled to recover from the plaintiff not only the purchase price, but also about $17,000 in addition thereto. His heirs might do the same had he died. The recovery at such time would have amounted to about $2,700 more than the damages awarded in this action, because the book value of the stock had declined over $43,000 in the meantime. The improbability of a party

making such a contract, as well as the manifest inequity of it, has led the court to scrutinize with great care the two written contracts, as well as the evidence in the case, to ascertain whether relief could not be afforded to the plaintiff against a judgment founded upon what appears to have been an improvident contract.

The only rational explanation of how this contract of December 1st came to be made is suggested by the referee in his decision, where he expresses the belief that when the second contract was signed the parties overlooked the fact that the stock liability of the corporation, as shown on its books, had been reduced $174,000 between the dates of the two contracts, and that neither realized that in the meantime the book value of the stock had been enhanced over forty per cent. It seems to us that this conclusion is correct, at least as to the plaintiff, and that the contrary finding made by the referee is incorrect.

In order to properly construe a contract susceptible of more than one construction, the court should place itself as nearly as it may in the position of the parties who made it, by considering the surrounding facts and circumstances, the nature of the subject matter, the relation of the parties to the contract, and the objects sought to be accomplished thereby. 2 Page, Cont. § 1123; *Mayer v. Goldberg*, 116 Wis. 96, 92 N. W. 556, and cases cited. When the language used in a contract is susceptible of more than one meaning, it is essential that the court should understand the conditions that existed when the contract was made, in order to adopt that construction which would express the true intent and meaning of the parties.

However, it is the duty of courts "simply to enforce contracts, unexceptionable on other grounds, precisely as the parties have made them, instead of making new contracts for them to meet the emergencies of a particular case, or to avoid some supposed inconvenience or hardship arising from the natural import of the written engagement. And the written instrument furnishes the best possible evidence of the inten-

tion, and determines the liabilities of the parties." *Heath v. Van Cott,* 9 Wis. 516, 522.

"In construing a contract it must be observed that, while the office of judicial construction is to give effect to the intention of the parties, and that words and sentences should be so construed as to subserve such intention, this does not mean that violence may be done to the words the parties see fit to employ, but only that it is the duty of courts to look at the whole and every part of the contract, and to give that construction to it which will make it effectual to carry out the real intention of the parties so far as the words they see fit to employ will permit, without doing violence to the rules of language or the rules of law." *Braun v. Wis. R. Co.* 92 Wis. 245, 247, 66 N. W. 196, 197.

And in construing contracts the courts "cannot give effect to the intention, however manifest, which plainly violates the rules of language or of law." *Mississippi River L. Co. v. Wheelihan,* 94 Wis. 96, 98, 68 N. W. 878, 879; 2 Parsons, Cont. 494.

Words may not be added to a contract unless obviously implied. Where the language used is not ambiguous the apparent import of the words must govern. Where the words used are of uncertain meaning, within certain limitations, that construction should be adopted which will best effectuate the intention; but words should not be constructively put into a contract that are not there. *Mississippi River L. Co. v. Wheelihan, supra.* When plain language is used in such a connection as to leave no room to say reasonably that the parties may have intended either of two meanings, the apparent import of the words as generally understood must govern. *Thurston v. Burnett & B. D. F. M. F. Ins. Co.* 98 Wis. 476, 479, 74 N. W. 131; *Wells v. M. & St. P. R. Co.* 30 Wis. 605; 1 Story, Cont. (5th ed.) § 780.

In speaking of an improvident provision made in a conveyance this court in another case said:

"But so long as the parties saw fit to insert in the grant plain words of limitation, pointing to particular instruments for measuring the water, we must hold to such plain meaning,

and not, for the purpose of relieving parties from difficulties which were not properly provided against at the proper time, put words into the grant by construction. That would be a violation of rules of law by judicial construction, and courts are not permitted to do that." *Appleton P. & P. Co. v. Kimberly & C. Co.* 100 Wis. 195, 201, 75 N. W. 889, 891.

In answer to the contention of counsel that testimony of the circumstances surrounding and leading up to the making of a written contract are always admissible for the purpose of putting the court in the position of the parties at the time the contract was made, this court has said:

"Not so! Where there is no ambiguity in the contract, either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court in the light thereof to read the instrument in the sense the parties intended, if that can be done without violence to the rules of language or of law." *Johnson v. Pugh,* 110 Wis. 167, 170, 85 N. W. 641, 642.

Parties cannot use terms with a fixed and certain meaning and then disclaim such meaning; at least not without reformation of the contract. *Murphey v. Weil,* 92 Wis. 467, 473, 66 N. W. 532.

Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which, by mistake, is not expressed in the words thereof. *Robbins v. Rollins,* 127 U. S. 622, 8 Sup. Ct. 1339; *Te Poel v. Shutt,* 57 Neb. 592, 78 N. W. 288; *Sinclair v. Hicks,* 116 N. C. 606, 21 S. E. 395; 2 Page, Cont. § 1130. Courts of equity may reform contracts for mistake or fraud when the modicum of proof required by the established rules of law is furnished to warrant reformation. *Braun v. Wis. R. Co.* 92 Wis. 245, 248, 66 N. W. 196, and cases cited.

Applying the foregoing rules of law to the facts in this case, is the plaintiff entitled to relief? His contention is that the

contract of August 22d provided for a sale of twenty-five of the five hundred shares of the capital stock of the corporation, or a one-twentieth interest therein, and that for the purposes of this case the subsequent contract should also be treated as a sale of a one-twentieth interest in the corporation, and that the decrease in the capitalization of the company in the interim between the execution of the preliminary and final contracts should not be held to affect the rights of the parties.

It must be remembered, however, that the plaintiff, by the contract dated December 1st, did sell and convey to the defendant, subject to his lien to secure the payment of the purchase money, twenty-five shares of the capital stock of the company as it then was, without any reference being made in the contract to the fact that any particular fractional interest in the corporation was sold, and that nothing was done by the plaintiff for a period of more than five years thereafter to indicate that he had in fact intended to sell but a one-twentieth interest instead of the much greater interest that he did in fact sell. No implication can be drawn from the contract that it was intended to sell any other or different interest from that expressly provided for. By said contract the plaintiff agreed, "in accordance with the terms of the agreement entered into between the parties heretofore on August 21, 1899 [meaning, no doubt, August 22d], to sell to said *Mengelberg* twenty-five (25) shares of the capital stock of said Herman Zohrlaut Leather Company at par." This provision can only be held to mean that the twenty-five shares of stock provided for in the former contract were to be sold by plaintiff to defendant. It cannot mean that the provisions of the former contract as to price should govern, because the parties specifically stated otherwise. If the amount of stock remained unchanged, the plaintiff would be entitled under the preliminary contract to receive about $2,700 above par for the stock sold, on the basis of any calculation, and over $2,000 more than that sum if there had been no change made in the stock

liability of the company, and if the other entries on th under date of November 30th were taken into account contract of August 22d called for the sale of twe shares of stock, and by the contract of December 1st th ber of shares were sold and transferred to the defendan without doing violence to the language used by the pa making their contract, we fail to see how we can hold smaller number of shares were sold, or how we can say settlement should be made on any other basis than th vided by the parties themselves in their contract.

We are impressed with the belief that the evidence a reasonable inferences to be drawn therefrom satisfa show that plaintiff mistakenly either sold a greater amo stock than he would have sold had he comprehended the of the book entries of November 30th, or that he so amount of stock which he did at a less price than he have sold it had he realized the extent to which the book of the stock had been so suddenly and so materially enh It may be that, had he seasonably applied to a court of for a reformation of the contract, he would have been e to relief. The plaintiff, however, has brought an act law on the note given in payment for the stock, and, if is given at all, it must be by a construction of the co which is not permissible as it stands. In other words, no escape from the conclusion that by the terms of the w contract the plaintiff did, on December 1st, sell twen shares of the capital stock of the corporation, and obl himself to repurchase it in the event of a certain contir arising, and which did arise in this case, and to purch stock at its book value at the time the contingency aros

We do not think the defendant had done anything to his right to insist that the plaintiff purchase his stock the terms and conditions provided in the contract betwe parties. Neither do we think any error was commit refusing to allow interest on the note sued upon. N

dends were declared by the corporation after defendant purchased the stock, and the contract of August 22d, which was referred to in the one later made, clearly provided that interest should not be charged in excess of the dividends declared.

The evidence offered was directed to the book value of the stock of the corporation on December 1, 1904. The defendant continued in the employ of the company until January 1, 1905. It is argued that the evidence offered did not establish the book value of the stock of the corporation as of the proper date. The date of December 1st was selected, presumably, because the corporation closed its books on that date. The variance in time between the two dates is slight, and it is highly improbable that there was any substantial difference between the value of the assets between December 1st and January 1st, or that the assets were less on the latter date than on the former. The books were within the immediate control of the plaintiff, and if any substantial difference existed it might readily have been shown by him. Technically the plaintiff was entitled to recover on the basis of the book value of the stock on January 1st. But we think the evidence offered substantially proved that value, and that no good purpose would be served by prolonging this litigation in order to determine whether there was a slight variation in the surplus of the company between these two dates.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

A motion by the appellant for a rehearing was granted on April 5, 1910, and the cause was again argued on October 29, 1910.

For the appellant there was a brief by *Nath. Pereles & Sons,* attorneys, and *Quarles, Spence & Quarles* and *Glicksman, Gold & Corrigan,* of counsel, and a separate brief by *T. W. Spence,* of counsel; and the cause was argued orally by *Mr. W. L. Gold* and *Mr. Spence.*

For the respondent there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *James G. Flanders.*

The following opinion was filed November 15, 1910:

PER CURIAM. A motion for a rehearing was granted in this case and the same has been reargued. Chief Justice WINSLOW and Justices BARNES and VINJE are agreed that the former decision was correct. Justices MARSHALL, SIEBECKER, and KERWIN reach a contrary conclusion. Justice TIMLIN, having been of counsel in the case, did not sit. This situation results in an affirmance of the judgment.

By the Court.—Judgment affirmed.

The following opinion was filed November 19, 1910:

MARSHALL, J. (*dissenting*). Three of the six justices, Justice SIEBECKER, Justice KERWIN, and the writer, who participated in this case believe the judgment to be unjust and that it should be reversed. It is regrettable that appellant cannot have a decision, the whole bench participating. The situation is out of the ordinary class of cases disposed of by a divided court. Generally no opinion is filed. Here the equal division developed after an opinion had been filed which now stands as showing the reasons for the affirmance. So the case particularly calls for an opinion, stating the reason why one division of the court, equal in number with the other, now believes the judgment to be wrong.

There is no very good room for differences of opinion respecting the legal questions involved. The authorities cited in the opinion by Justice BARNES state the law as regards the situations with which they dealt. They announce mere elementary principles, as do many other cases that might have been referred to, specially, but were not, perhaps, because it was thought they were not in full harmony with those which were cited. We refer to cases of which the following are good samples: *Steele v. Schricker,* 55 Wis. 134, 12 N. W. 396;

Boden v. Maher, 105 Wis. 539, 543, 81 N. W. 661; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 553, 93 N. W. 459; *Hackley Nat. Bank v. Barry,* 139 Wis. 96, 120 N. W. 275; *Hart v. Hart,* 117 Wis. 639, 648, 94 N. W. 890; *Newell v. New Holstein C. Co.* 119 Wis. 635, 639, 97 N. W. 487; *Mitchell v. Mitchell,* 126 Wis. 47, 50, 105 N. W. 216; *U. S. G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238.

If there were any warrant for doubting the existence of harmony between these authorities and the others and reaching a conclusion upon the theory that if a contract, looking at its words alone, means clearly one thing, it cannot be shown to be ambiguous by applying it, with or without the aid of extrinsic evidence, to the subject with which it deals, and then given a different meaning if necessary to effectuate the intent of the parties; it seems there was not such warrant when the cause was taken up for consideration, since any such misconception as existed respecting such want of harmony had been, in the meantime, cleared up. *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43.

In the *Klueter Case* the court endeavored to set at rest, as it often had before, all questions as to what aids may be called in for the purpose of discovering ambiguity and how obscurity of meaning, when discovered, can be cleared up. We are safe in saying that the court was successful, especially as regards the bearing of principles on this case, since eminent counsel for the respective parties frankly conceded on the reargument that the rules were stated in all respects correctly, and as they had always been maintained in this and other courts. It was rather conceded, as we supposed, when the case was decided, that if it be legitimate to show that a contract which is plain, looking at the words only, is not so when applied by the aid of extrinsic evidence to the subject with which it deals, and then for the purpose of clearing up the obscurity, the facts and circumstances characterizing the making of the contract may be shown by extrinsic evidence; thus

enabling the court to view the writing from the standpoint of the parties when they made it, it was at least a very grave question whether plaintiff could recover.

Counsel for the respondent on the reargument necessarily had to come out from, if they before went into, hiding behind the idea that ambiguity cannot be disclosed and cleared up in the manner indicated, which was, seemingly, the refuge here of the court on the former occasion. Counsel on the second argument planted themselves firmly on the ground that the contract is not ambiguous either in its literal sense or when applied, with or without extrinsic evidence, to the subject with which it deals; and that taken either way the only meaning which can be read out of it is the one which forms the basis for the judgment complained of; that if the minds of the parties did not meet on that precise meaning, which counsel would not concede, they failed to use language from which, by the rules laid down in the *Klueter Case,* any other reasonable meaning can be fairly gathered than the one discovered by the trial court. We must assume that such is the attitude of the justices who adhere to the former affirmance.

From the foregoing we assume the doctrine of the *Klueter Case* and those therein referred to not be open to question. Therefore the right of the matter in controversy is to be tested by these rules:

1. A written contract cannot be varied by parol evidence.

2. A written contract, if plain in its literal sense and when applied to the subject with which it deals, must speak without the aid of extrinsic evidence.

3. The intent of the parties to a written contract, so far as it can be read, by aid of construction, out of the writing, but not otherwise, must be taken to be, in the legal sense, the contractual intent.

4. In the construction of a contract no meaning can be properly attributed to it other than one which by rules of construction can be found in it, but all words necessarily or rea-

sonably in place by implication should be deemed to be actually in place.

5. If a written contract, either looking to the words alone or when applied, with or without the aid of extrinsic evidence, to the subject with which it deals, is ambiguous, the court may, aided by evidence of the facts and circumstances characterizing the making of it, give effect to the real intent, so far as it can reasonably be read out of the writing without violating the rules of language or of law.

6. It is to be presumed that the parties to an agreement did not intend to make an absurd or a very unreasonable one,—one that two men, acting understandingly, could not fairly be expected to make. Therefore when the apparent meaning of an agreement, either in the words by themselves or by applying them to the subject matter, is unreasonable or absurd, ambiguity exists requiring to be solved by judicial construction.

Now let us give a brief *resumé* of the facts and then apply the foregoing thereto.

June 18, 1899, a certificate for 174 shares, making up the full capital stock of 500 shares, was duly made by the officers of the Herman Zohrlaut Leather Company in favor of Herman Zohrlaut to carry out a contract between him and the corporation in respect to its purchasing certain property of him. The contract was, in the end, substantially carried out but not at all in the manner contemplated. At or about the date of the contract *Edward Zohrlaut* took over the interest which Herman owned in the corporation, including his right to the 174 shares. Whether the certificate for such shares was delivered does not appear. The indications are rather to the contrary, and that no formal transfer was made to *Edward,* but that the certificate remained with the corporation till canceled as hereafter stated. However, appropriate entries were made so that, August 22, 1899, the books showed the 500 shares to be outstanding and that equitable ownerships in the corporate assets existed accordingly. It was then agreed between *Edward,* president of the corporation, and defendant, *first,* that

the former should sell to defendant *"twenty-five shares of the five hundred shares of the capital stock"* as of November 30, 1899, at the book price according to the then closing price thereof, the purchaser to give his interest-bearing note therefor, the stock certificate to be held as security for payment thereof, the dividends to apply on interest up to the fixed rate therein, and any surplus on the principal, and, if less in amount than such rate, to offset the interest; *second,* that in case of defendant ceasing to be a director the seller should repurchase *"said twenty-five shares"* at the book value at the date of repurchase, less any unpaid principal of the notes.

October 4th, at a meeting of directors, both parties being present, it was agreed to reduce the capital stock to 326 shares by canceling certificate for 174 shares. No change was made in the books till after the date fixed for determining the book price of stock under the agreement to sell the twenty-five shares. The books then showed that the stock was worth about 110. Thereafter they were changed in accordance with the agreement of October aforesaid, thus increasing the book value of twenty-five shares somewhere around $14,000.

After such change *Zohrlaut* and defendant made a contract, supplementary to that of August 22d and without any negotiations varying the essential terms of sale and purchase as aforesaid. In such second agreement *Zohrlaut* promised, among other things, "in accordance with the terms of the agreement of August 22d," to sell defendant twenty-five shares of the capital stock of the corporation, taking his notes therefor substantially according as before stipulated.

This supplementary agreement was made December 1, 1899, though not executed till the following January. Thus the first agreement as to taking back the stock without change survived the supplementary agreement. The sale was consummated on the basis of the first agreement, *i. e.* the book value of November 30, 1899, before the 174 shares were canceled.

Years after the last occurrence mentioned, upon the contin-

gency arising making operative the agreement to repurchase, defendant claimed the benefit of twenty-five shares on the basis of the corporate assets belonging to the owners of 326 shares, whereas he bought on the basis of their belonging to owners of 500 shares. The book value of the total assets had decreased in the meantime, but such value per share had greatly increased by the cancellation of stock. The claim of defendant prevailed, resulting in a judgment against appellant for $14,312.52, and interest, making, with costs, $17,606.78, for which the latter did not receive and the former did not give any consideration whatever; plainly a profit which was not within the contemplation of the parties when the agreement was made. It prevailed upon the theory that, regardless of what the real intention was, no other, with or without the aid of rules for construction, could be gathered from the writings than the one the court adopted.

The result indicated convicts the parties of having made a contract so very unreasonable that probably all would readily agree the minds of such parties never met upon a transaction which could produce it. That renders the meaning of the writings obscure if otherwise they would be plain, a situation for judicial construction under the aforementioned elementary principles.

True, if a meaning leading to such an absurd result is the only one which can reasonably be discovered within the scope of the language used in the writings, then that meaning, as indicated in one of the rules, must prevail if the contract be enforced at all as written. True, however, as also indicated, the intention of the parties must prevail and their words be bent to that end, if need be, so far as that can be done reasonably. True, also, as indicated, no meaning can be properly ascribed to such words other than such as can be found within the scope thereof. So far as the parties failed by mutual mistake, or fraud on one side and mistake on the other, to embody their real meaning in the writing, the mutual purpose cannot be effectuated without equitable interference.

It seems that all must agree that the meaning which has prevailed is so inequitable that, not only it should not prevail if a reasonable one can be fairly read out of the writings, but, if no such reasonable meaning can thus be found, then the parties utterly failed to put into such writings what their minds met upon.

The foregoing certainly calls for extending or restricting the meaning of the language of the writings to the utmost reason will permit in order to find therein a reasonable one in harmony with the intent of the parties. That intent, independently of the writings, must be conceded to be unmistakable, viz.: that the stock should be sold to respondent on a particular basis and bought back, upon a contingency mentioned, upon precisely the same basis, subject to change in the meantime, one way or the other, according to the profitableness or otherwise of the business; that there was no thought of any probability, or even possibility, of the value being enhanced or depreciated by mere bookkeeping, stock being increased in value without any increase in value of assets. That seems too clear for reasonable doubt. We do not understand there is any serious difference in respect thereto. The difference is in whether such manifest intent can be read out of the writings by aid of rules for construction which the court has recently held, and which counsel for both parties, as before indicated, agree our books lay down plainly and harmoniously. We now turn to the writings.

It is significant that both papers contemplate a sale price according to the state of the books November 30, 1899, and upon a basis of there being 500 shares of stock, and that the idea was to give respondent during his term of employment a share of the profits on the basis of his having twenty-five of five hundred shares of stock. It is not probable, it was thought respondent would ultimately pay for the stock. It was set aside merely to represent his proportion of the prospective profits or losses of the business on the basis of one to twenty. The stock was retained with the note, one being

considered equivalent to the other, except for prospective profits sufficient to more than pay interest on the notes. Let us not lose sight of significance of the fact that the sale was of twenty-five shares according to the book value of the stock divided into 500 shares. The notes were given in accordance therewith. They were not given till after the change in the book value by cancellation of the 174 shares and after the making of the supplementary agreement, expressly providing that the sale should be "in accordance with the terms" of the first agreement. Let us also keep significantly in view that the certificate was left with the notes, the one being supposed to be and remain the exact equivalent of the other, subject only to change as aforesaid, which was true on the basis of the stock sold being *"twenty-five shares of the five hundred shares,"* but not true on the basis of its being twenty-five shares of the 326 shares. Let us also keep prominent that the agreement to buy back referred to the subject to be dealt with, not as twenty-five shares of the capital stock but *"said twenty-five shares," i. e.* twenty-five shares of five hundred shares. Does not that feature plainly indicate upon the very face of the writings, unmistakably, a purpose to take back the precise interest sold, namely, one twentieth of the capital stock? If not, such being the manifest purpose, unless we are to convict the appellant of being incapable of contracting intelligently, does it do violence to rules of language or of law to read, as in place after the words "agree to purchase said twenty-five shares," the words "of five hundred shares," repeating thus the words describing the same subject when it was one of sale to respondent?

No rule for construction of contracts, statutes, and constitutions is more firmly established than that, while words cannot be arbitrarily interpolated into a writing, even to carry out the manifest purpose of the authors thereof, that purpose may and should be effectuated by reading as in place all words which are there by reasonable or necessary implication. All

elementary and judicial authorities might be successfully appealed to on that, but our court has declared it over and over again and most significantly on two occasions at this term of court. *Mississippi River L. Co. v. Wheelihan,* 94 Wis. 96, 98, 68 N. W. 878; *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43; and *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 128 N. W. 1041.

True, under cover of construction, the court cannot relieve parties from a mistake in not expressing their real intention in their written agreements. But should that plain rule, which all admit, blind us to the rule of equal dignity, that the court can give effect to the intent of the parties so far as it can be read out of their writings within the uttermost scope of the language thereof, and by the aid of the broad power of judicial construction,—and that it is its duty to do so? Does it not seem that one rule, to which all agree, is given such prominence by one division of the court that its overshadowing dignity, for the time, has obscured that other rule, which all must agree is of equal significance, that words can be given a very narrow or very broad meaning, departing far distant, in some cases, from the ordinary meaning, and words can and should be deemed to be in place which the context and subject matter reasonably suggest, in order to prevent the injustice of the real purpose not being carried out, giving one party an advantage over the other which was not within their mutual contemplation as within reasonable probabilities? Must we not, in all such cases as this, bear in mind that, while a meaning not within the scope of a contract cannot be put there by construction to help out a party who through mistake failed to use language to express his purpose, the very office of judicial construction is to save parties from their failure, through negligence or mistake, to express unambiguously their purpose, if they expressed it discoverably? Upon that valuable instrumentality the rightful vitality of writings commonly depends. It is by no means an instrumentality to be re-

garded with disfavor and used reluctantly. Right the reverse, as the teachings of the learned text-writers and judicial authorities and our own books amply show. The intent is never to be sacrificed to the letter where that can reasonably be avoided, but rather the letter, within the boundaries of reason, is to be sacrificed to the intent.

Doubtless apparent conflicts seem now and then to come from comparing instances where the court has, seemingly, applied rules for construction with apparent reluctance, with others where the same rules were applied with the utmost liberality, the court in the latter appearing to be more keenly alive than in the former to its great function to administer justice in fact as well as in form, sweeping aside the mere literal sense of words as forming no obstacle whatever to the supremacy of mutual intention, if expressed at all, however obscurely. Many instances of this might be given, but they are so numerous and so well known and the underlying principle is so familiar that citations are omitted.

The ultimate duty in construing contracts is well phrased in 2 Parsons, Contracts (9th ed.) 496, thus:

"The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law will permit."

So it will be seen that the first question in construing a contract of double meaning is, What was the intention of the parties? That, as indicated, may be determined by applying the writing, with or without the aid of extrinsic evidence, to the subject with which it deals. Here the intention is manifest, *i. e.* to sell and buy back, if necessary, a certain interest in the corporation, measured by twenty-five out of five hundred shares, so that the person holding the title in the meantime would participate in the profits of the business in the

proportion of one to twenty and that the seller should resume his title, if necessary, without loss other than the proportional losses which might accrue in operation of the business.

The next question is, To what extent was such intent embodied in the writings by the most liberal treatment thereof which rules of language and of law will permit? Any failure to go to that extent to save the intent, is a failure of justice attributable to the court. Any failure after going to such extent to find that the real intent was embraced in the writing, is a failure of justice attributable to the parties themselves, which only equity can relieve them from. Manifestly there should be no failure to discover such intent to be expressed where it is perfectly manifest, as here, without first exhausting the whole arsenal of weapons for construction which the law has furnished us with.

It seems to us that the fair meaning of the writings upon their face is that the transfer and retransfer of stock referred to the same interest as compared with the same whole, or assets subject to change in value of the latter by operations of the business. If that were not so it seems to us that by the rules for construction to which we have referred, such meaning can be very easily found embodied in the language of the parties, and that the result of the litigation below left binding on appellant because of the equal division is to make for the parties and enforce a contract which they had no thought of making.

If we could not otherwise come to the conclusion above indicated, the treatment of the contract by the parties at the time the notes were given would settle the matter. The notes, as before indicated, were not given until long after the entries were made reducing the capital stock to 326 shares. As said, they were obviously given and taken as the equivalent for the twenty-five shares, as the fact was, on the basis of such shares representing such proportion of the assets of the corporation as one to twenty. They were not, however, by some $14,000,

on the basis of such shares being a part of a total of 326 shares. So by practical construction the parties solved any ambiguity which otherwise might have existed in the writings.

We will not discuss the matter further. We have no apology to make for discussing it at so great length. Since the opinion on the former hearing is to remain on file, once, but not now, concurred in by a majority of the court, it has seemed quite necessary for us to adequately emphasize our dissent from the result which stands, under the circumstances, only upon the dignity of the trial court's decision.

The injustice, from an equitable standpoint at least, of the result of this litigation, is such that, doubtless, there would be a prevailing inclination to open the way to avoid it if there were a prevailing idea that judicial power existed to do so. That opens up an important field of inquiry which duty calls upon us, it seems, to explore.

Attention has been called to *Wis. M. & F. Ins. Co. Bank v. Wilkin,* 95 Wis. 111, 69 N. W. 354, as suggesting the way to opportunity for yet presenting an equitable defense. There plaintiff recovered on the hard-and-fast lines of a contract. Defendants, through excusable mistake of counsel, depended, as here, upon a favorable construction of the agreement. Only after an expensive trial below in which they prevailed, and a review on appeal in which they failed and judgment was ordered for plaintiff, was it discovered that no relief was obtainable from the harsh results of the writing except by successfully invoking equity authority of the trial court for reformation. In that situation a motion was made here in the nature of a motion for a rehearing for a modification of the mandate so as to permit the trial court, in its discretion, to allow the answer to be amended setting up the appropriate equitable defense. The motion was granted, likewise was the motion in the trial court for leave to amend, the case was tried in its new aspect, the defendants prevailed, and on appeal to this court the judgment was affirmed. [*Wis. M. & F. Ins.*

Co. Bank v. Mann, 100 Wis. 596, 76 N. W. 777 would seem to furnish a pretty good precedent for modifying the mandate here.

True, in the former case the judgment appealed i at first reversed. That feature alone we do not thin the way to the application for leave to amend. Fu that case, a motion was made here, specially, for a ı tion of the mandate. But the fact that the case nov back with a judgment, while in the former it did not make any difference, in our judgment, if the time ha pired below—beyond any relief even by aid of this set aside the judgment on terms. Neither can the f appellants have not specifically asked for a modific the mandate, and authority to the trial court to ent motion to set up a new defense which, by mistake, was to be timely made,—since the case is fully under contr court to grant such relief on the motion for a rehea even without any motion at all. The hands of this c by no means otherwise tied so as to prevent it from do tice in a case over which it has jurisdiction. It need ı to be invoked for the special relief, or invoked at al common and ordinary way is for the court to wait to be but it need not, necessarily, and in a case of exception ship it ought not to. The sacred thing which this gre should preserve and conserve, at all times and under cumstances, is the real right of the matter in controv

It is suggested that to affirm a judgment, making it this court, and then empower a trial court to open up would be without precedent. Granted. But are th of justice to be efficiently impeded, or are we to hold instrumentalities to attain justice have been exhaus cause of no precedent being in sight? In *Wis. M. & Co. Bank v. Wilkin, supra,* and many other case might be mentioned where very valuable rights were i the power of the court to deal efficiently was challen

so much upon principle as because of a dearth of precedent. In all such situations the principle is the dominant thing, as the court has often said. If it were not for appreciation of its dignity our system would be far less adequate to redress and prevent wrongs than it is in fact. It is not thought that the broad constitutional and inherent power of our judicial system to deal efficiently with new situations, can be adequately measured by precedent.

One pretty good answer to the suggested anomaly of affirming a judgment and then permitting the trial court to proceed in the case in a way to disturb that judgment, is that the judgment as affirmed is, in effect, conditional. Moreover, the court is not without precedent to proceed in an action in the trial court, after judgment, without disturbance thereof till it appears to be so inequitable that it should not be enforced. Why may not an issue, in the peculiar circumstances, by permission of this court, under the statutes hereafter referred to, be made up in the nature of the remedy by *audita querela* and tried, having the same effect, in the ultimate, upon the judgment rendered as an independent action to prevent the enforcement thereof upon the ground of its inequitable character?

At this point we are discussing the question of power. That may exist and yet should be very sparingly exercised so not to invade the wise public policy and that of the written law, that judicial controversies should be terminated without exact justice being reached rather than be prolonged unreasonably.

But it is suggested that this court is powerless to give any efficient relief by modifying the mandate so as to permit the trial court to hear an application to excuse the mistake, as our associates would claim, of failing to set up an equitable defense to respondent's claim seasonably, because the time for granting such relief is limited by sec. 2832, Stats. (1898), to one year after notice of the entry of the judgment, which time has obviously expired.

True, the general understanding is that after the lapse of the year prescribed in such section the trial court should be deemed to be without jurisdiction to vacate its judgment and grant a new trial of the same or new issues brought in by amendment; that remedies for relief from such a judgment are confined to such as this court affords by writ of error or appeal, or such as is within the power of the trial court in exceptional cases by an independent equitable action to enjoin the enforcement of the judgment. *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 137, 79 N. W. 229; *Ludington v. Patton,* 111 Wis. 208, 248, 86 N. W. 571; *Uecker v. Thiedt,* 133 Wis. 148, 113 N. W. 447.

Is it true that there is absolutely no remedy in the action affordable in the trial court in a case of this sort after the expiration of one year from the entry of the judgment, even supplemented by all the boundless supervisory power of this court?

Sec. 2831, Stats. (1898), provides that except as "otherwise specially prescribed by law, the court . . . may also, on motion and good cause shown, in discretion and upon such terms as may be just, allow any" proceeding to be done "after the time limited by or in pursuance of the statute or by any order of court." That is a very broad provision. It is difficult to mention any case falling within the term "otherwise specially prescribed by law" except the time for taking appeals. That is so prescribed in the section itself. It has been held to apply to sec. 3766, which, in language quite as mandatory as that in sec. 2832, provides that the circuit court shall dismiss a case appealed thereto from justice court unless brought to trial before the end of the second term after the filing of the return of the justice therein, or continued by special order for cause shown. However, it has been held that, long after the expiration of the time limit and after actual dismissal of the appeal on that ground, the court has power to reinstate the case under sec. 2831. It may be that and similar cases are

not in strict harmony with *Miami Co. Nat. Bank v. Goldberg,* 126 Wis. 432, 105 N. W. 816, where it was held, in effect, that sec. 2831 does not apply to cases under sec. 2867, but an examination of the two statutes will disclose a difference furnishing some warrant for the differing holdings, and it will be observed that the difference does not exist as to sec. 2832. Probably the situation in the cases generally as to the court being without power are to be regarded as meaning that though it has power, under its broad constitutional authority, it ought not to use it where the legislature has reasonably provided that it shall not, and where it should not for that reason exercise its constitutional authority, it should be regarded, to all intents and purposes, to be without jurisdiction.

So it may be conceded for the purposes of the discussion that a trial court should, unless aided by this court, regard itself as without jurisdiction to open a case for further hearing unless the motion therefor is made within the time limited in sec. 2832.

Notwithstanding the foregoing, can this court properly act in the circumstances before us? Its power of superintending control is very great. It is as boundless, this court has said, as are the possibilities of need of its activity to direct and control trial courts to the end that justice may be done between parties. It is commonly invoked by use of some appropriate writ, this court by such instrumentality taking to itself the situation to be dealt with. But where the situation is here no writ need be used to bring it here, and where the court has been invoked for relief which it cannot grant, it has in many situations power to grant some appropriate relief in place of that asked.

With these observations as to the scope of the power of this court and that of the trial court, we will state our conclusion as to what may legitimately be done, and ought to be done, in the situation before us.

The appeal to this court was made promptly after the judgment was rendered. A *supersedeas* bond was given and the

trial court ousted of jurisdiction to do anything in the case pending the appeal. There has been no time since a few days after the judgment was rendered when appellant could have properly moved the court below for relief under sec. 2832. It may be that the *supersedeas* by itself might be held to so interrupt the running of sec. 2832 as to afford opportunity to move under such statute after the suspension of proceedings below shall have ceased. It should be given such effect, in connection with the power of the circuit court under sec. 2831, that this court under its broad power of judicial administration, in a case under its control, is not without power in sending it back to the trial jurisdiction to do so with authority—in discretion there exercised within a reasonable time after filing the *remittitur* and on motion and such terms as may be thought equitable—to open the way for appellant to interpose an equitable defense as was done in *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777. If power exists here to so send the cause back, as we think it does, and otherwise there may not be an opportunity to properly invoke judicial assistance for protection against a result which is highly inequitable, the court ought to use the power. That would still leave the trial court to pass on the question of whether appellant is not precluded from further use of judicial machinery, by reason of laches, which may be a very difficult question to solve, though it would seem that great significance would be due to the fact that such laches as there was grew out of the judgment of counsel which this court has not been able, by a majority decision, to condemn.

SIEBECKER and KERWIN, JJ. We concur in the foregoing opinion by Mr. Justice MARSHALL.

The following opinion was filed December 5, 1910:

BARNES, J. The members of the court who have reached the conclusion that the judgment should be reversed having

set forth their views, I deem it appropriate to add something to what is said in the opinion of the court originally filed, on an aspect of the case not there treated.

Whether the decisions of this court are in harmony or not, as to when an ambiguity should be found to exist in a written contract, is not very material. Those who have occasion to study the cases will form their own conclusions, and judicial assertion of harmony or of lack of it is inconclusive and wholly immaterial.

Before passing from the subject I desire to call attention to the sixth paragraph of the opinion of Mr. Justice MARSHALL. In short, that paragraph means that if a contract is unreasonable it is ambiguous, and the court will proceed to fit the language used to its idea of what the contract should have been. There is some advantage in adopting this method for construing contracts, because the courts have the benefit of hindsight, while the parties must content themselves with using foresight. The main trouble with judicial action of this kind is that it is liable to lead the courts into making contracts for parties which they never contemplated. Such supervisory action might well be more intolerable than the injustice that will sometimes result from a party making an improvident contract, which he can always have reformed in a court of equity for fraud or mutual mistake, if he is able to establish either to the satisfaction of the court. If the minds of the parties do not meet on the contract as written, there may be a rescission, if timely steps are taken to rescind and the parties can be placed *in statu quo*. *De Vain v. De Vain,* 76 Wis. 66, 44 N. W. 839; *Meinecke v. Sweet,* 106 Wis. 21, 24, 81 N. W. 986; *Zoerb v. Paetz,* 137 Wis. 59, 64, 117 N. W. 793. In one sense it is unfortunate that we cannot always decide cases in accordance with the equities of a particular case. But the rules of law must be as fixed and definite as is reasonably possible in order that men may know what the law is and govern themselves accordingly in their actions and in the conduct of their affairs. So, as there must be a choice of meth-

ods, the occasional injustice that will result from an observance of fixed rules of law is preferable to the chaos that would result if mankind had no guide to tie to and the law pertaining to a given transaction could not be known until a court passed upon the equities between the parties.

The opinion first filed proceeds upon the ground that there was no ambiguity in the language of the written contracts, either in a literal sense or when applied to the subject thereof. If we interpret those contracts in view of all the testimony in the case and after considering every fact and circumstance shown by the evidence, I think the result must be the same, because it cannot be said that the parties ever contemplated a sale of less than twenty-five shares of the capital stock of the company. The August contract provides for a sale of twenty-five of the then outstanding five hundred shares of the capital stock of the corporation. The December contract called for a sale of twenty-five shares of the capital stock of the company outstanding when the August contract was made. Those twenty-five shares were delivered to the defendant. The final contract, though dated December 1st, was not in fact made until the following January. The surrender of the 174 shares of stock was made in the preceding October. The book entries in reference thereto were made in November. The plaintiff held these twenty-five shares of stock as collateral for more than five years. There is nothing in the evidence from which it can be assumed that *Mengelberg* ever intended to take or accept less than twenty-five shares of the stock. He had the right to insist on it, but not to insist on paying only the price which he did for it. If there is anything in practical construction, then the parties here have placed an intensely practical construction on their agreements in this case, by the one delivering and the other accepting and paying for the property described in the contract, by the vendor receiving back the stock sold as collateral security for its purchase price and by his retaining it for five years.

It may be true that if *Mengelberg* had insisted when the

December contract was made that all he would invest in the stock was $25,000, and *Zohrlaut* fully understood the amount the stock had been appreciated in value by the surrender of the Herman Zohrlaut stock, he would not have agreed to a sale of twenty-five shares of his stock at par. But the fact remains that twenty-five shares of stock were bargained for in August and twenty-five shares were sold and delivered, and that such shares were twenty-five of the five hundred shares outstanding in August. If we disregard *Mr. Zohrlaut's* testimony, the inference is strong that the mistake made by him was not in selling and delivering the twenty-five shares he had contracted to sell and deliver, but in overlooking an important fact in fixing the price of what he parted with. If this be true, no relief can be granted in this action. The contract fixed the method of determining the price at which the stock was to be repurchased. We cannot change the contract by reducing the book value of the stock on December 31, 1904, because the defendant purchased it too cheaply in December, 1899.

Aside from what has been said, I think an examination of the record in this case well nigh demonstrates that the minds of the parties never met on any contract whereby the defendant was to receive less than twenty-five shares of the capital stock of the corporation as it existed when the stock was delivered. The case was tried before a referee, and, as is usual in such cases, no very close line was drawn on the admission of evidence. The plaintiff was examined under sec. 4096, Stats. (1898), under sec. 4068, Stats. (1898), and was examined as a witness in his own behalf and cross-examined at length in reference to the transactions involved in the case. He nowhere intimates or says that he sold or intended to sell anything other than twenty-five shares of the capital stock of the corporation as it stood on November 30, 1899. What he does say is very different. He testifies that he had no particular knowledge of the condition of the business when the

contracts with the defendant were made; that he did not know whether the corporation was solvent or insolvent; that he talked with *Mengelberg* about the conditions of the business, and that the latter, "after examining the books and the business thoroughly, came to the conclusion that the stock was worth about par, and we settled it that way." In other words, as it appears from the above testimony, and elsewhere, he practically allowed *Mr. Mengelberg* to fix the price of the stock; and he testifies that he knew the stock of Mr. Herman Zohrlaut, his father, had been surrendered and canceled in the preceding October.

Furthermore, that keen, resourceful, and able lawyer, Mr. Charles Quarles, who tried the case for the plaintiff, did not seem to be able to satisfy himself that, where a man had agreed to sell twenty-five shares of the stock of a corporation and had in fact transferred and delivered it and received his pay therefor and retained the pay and permitted the transaction to stand for five years, he had in fact only sold sixteen and three-tenths shares. In opening his case he stated that the theory of the plaintiff was that from December 1, 1899, on a statement which *Mengelberg* had made up, it appeared that the stock of the corporation was in fact worth par, and that on January 1, 1905, the same was true, and that in determining these facts all of the books of the corporation should be considered and taken into account and not simply those that had been manipulated by the defendant. The statement of Mr. Quarles as to his theory of the case is preserved in the record, and there is no suggestion in it that he considered the contract as being susceptible of a construction that some fractional interest in the corporation was intended to be sold rather than the twenty-five shares of stock specified therein. Of course *Mr. Mengelberg's* testimony negatives any idea that any other or different interest was sold than twenty-five shares of the capital stock of the corporation as of November 30, 1899. So I think it clearly appears from their

own mouths that neither of the parties intended to write any such provision in their contract as it is attempted to insert therein by means of construction resorted to to meet the hardships of the case.

Whether the contract be treated as ambiguous or unambiguous, I think there is nothing in the record which shows any intention on the part of the plaintiff to sell or the defendant to buy less than twenty-five shares of the corporation stock, and that to construe the contract otherwise would amount to making an agreement between the parties on which their minds never met.

This court exercised and could exercise only its appellate jurisdiction in this case. In the exercise of that jurisdiction it reverses judgments only for error, and no error having been discovered the judgment should be affirmed as a matter of course. As to what rights the plaintiff may have in the trial court after the record is remanded, I do not desire to express any opinion, because that question is not before this court.

I am authorized by the Chief Justice and by Mr. Justice VINJE to say that they concur in this opinion.

On December 14, 1910, the appellant moved that the court "(1) grant a rehearing on the question as to what the writings mean; (2) modify the mandate (a) by reversing the judgment and directing a new trial, (b) or in case both motions be denied, then that it be modified by adding thereto permission to the circuit court to entertain a motion to set aside the judgment and for leave to amend the reply to the counterclaim."

The motion was denied January 31, 1911.

City of Milwaukee, Respondent, vs. United States Fidelity & Guaranty Company, imp., Appellant.

January 10—January 31, 1911.

Officers: Clerk of Milwaukee municipal court: Official bond: Statutory or common law? Construction: Action for breach: Parties: Statutes: Special and general: Re-enactment and repeal.

1. The act creating a district court in Milwaukee county (ch. 218, Laws of 1899) made the clerk of the municipal court *ex officio* clerk of such district court, without requiring of him an additional bond or oath of office. The new court was in fact created to relieve the municipal court of its lesser business, so that the clerk was simply required thereby to perform part of his old duties in a separate tribunal. *Held*, that the bond given by him as clerk of the municipal court covered his acts as clerk of the district court also.
2. A bond given by the clerk of the municipal court of Milwaukee county to the city of Milwaukee, conditioned that he shall "well and faithfully *in all things* execute and discharge the duties" of his office "without any fraud, neglect or omission," and shall indemnify the city against all damage from his acts or neglect, is broad enough to entitle the city to recover thereon for moneys which such clerk is required to pay over to the city treasurer, although they do not belong to the city but are to be paid over in turn to the county treasurer or as fees to witnesses.
3. A bond given by a public officer is not deprived of its character as an official statutory bond by the fact that it differs in verbiage from the bond prescribed by statute, or by the further fact that it covers *all* of his official duties, while the statute requires one covering only the single duty of paying over moneys. In such case the surplusage will be rejected and the bond sustained as to the statutory conditions which it includes.
4. Such a bond being an official and statutory bond to the extent that it includes statutory conditions, the liability so far as such conditions are concerned is to be construed and enforced with the aid and in the light of all statutory provisions bearing thereon.
5. Where the bond of the clerk of a municipal court is required to be given *to the city*, such city is the proper party to sue for a breach of its conditions in failing to pay over moneys, regardless of the ultimate disposal of such moneys or whether or not the city is the real party in interest. The city in such case is the trustee of an express trust within sec. 2607, Stats. (1898).

6. Notwithstanding sec. 4816, Stats. (1898),—re-enacted from R. S. 1878,—requires forfeited bail moneys to be paid into the county treasury, ch. 36, Laws of 1897, being a special act applying to the municipal court of Milwaukee county, governs in respect to that court and requires bail moneys forfeited therein to be paid over to the city treasurer.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action against the appellant as surety upon the official bond of one Woller. The action was tried by the court. The facts are not in dispute and are substantially as follows: Woller was elected clerk of the municipal court of Milwaukee county April 2, 1901, and thereafter qualified and gave a bond to the city in the sum of $10,000, signed by the appellant as surety, conditioned as follows:

"Now, therefore, the condition of this obligation is such that if the above bounden Frank E. Woller shall well and faithfully in all things execute and discharge the duties of the office of clerk of the municipal court of said county, during his continuance therein by virtue of such election, without any fraud, neglect, or omission, and shall save harmless and indemnify to such city of *Milwaukee,* as aforesaid, from and against all acts or doings or neglect to do, of him, the said Frank E. Woller, and of all judgments, penalties, costs, charges, or damages in any action, that may be brought against the said Frank E. Woller, by reason of any act or omission done or suffered by the said Frank E. Woller, as such clerk of the municipal court, then this obligation shall cease and to be void, otherwise to be and remain in full force and effect."

The municipal court is the superior criminal court of Milwaukee county, and by sec. 2506, R. S. 1878 (as amended by ch. 7, Laws of 1895), the clerk is required to pay over quarterly to the city treasurer "all fines, penalties, collections and other fees, except witnesses' fees," and other moneys belonging to either the city or county treasury which may come into his hands; also semi-annually to pay over to the city treasurer

uncalled for witnesses' fees, except the witness fee to policemen testifying for the prosecution, which ar to be paid over to the policemen's relief associa sec. 2504, R. S. 1878, the clerk is required to give bond

"conditioned that he shall account to and pay over t treasurer of said city, on the first Mondays of Janua July and October, all fines, penalties, and other m longing to the treasury of the city or county of M which may come into his hands by virtue of his office up to the day of such payment, and that he shall, or Mondays of January and July in each year, accoun pay to the treasurer of said city all witnesses' fees w have come to his hands as such clerk, up to the da ment and which have not been paid to the person thereto."

By sec. 2512, R. S. 1878, the city treasurer ann the time of paying over the state and county taxes, is to pay over to the county treasurer all fines and pena lected in criminal cases.

By ch. 218 of the Laws of 1899 an inferior crimi was created in Milwaukee county, called the district c it was provided by sec. 9 of that act that the clerk of nicipal court should be *ex officio* clerk of such new court and that he or one of his deputies should perfor duties of clerk of such court, but should receive no fe sec. 13 of the last named act (as amended by ch. 363, 1901) substantially the same provisions are made a clerk's duty to pay over to the city treasurer all fines a alties, collections, costs, and fees, including witness are made with regard to the municipal court in se R. S. 1878, above cited, except that uncalled for jus constable fees are added to the witness fees which a turned over semi-annually to the city treasurer. By of the district court act the same provision with regard ment of fines and penalties by the city treasurer to the

treasurer is made as in the section governing the same subject in the municipal court act.

Woller resigned June 7, 1907, having fraudulently converted trust moneys in his hands as clerk of both courts, amounting in all, less credits, to $29,774.82. Of this amount $15,825 was made up of what is called "live" bail moneys, *i. e.* moneys deposited in court instead of bail bonds to insure the appearance of accused persons bound over for trial, and it is conceded that the bond does not cover these sums. The sums which the court found were covered by the bond are as follows:

Municipal Court.

State cases, fines	$1,846 00	
Witness fees	26 38	
Interpreter's fees	5 08	
Sheriff's fees	84 38	
City cases, witness fees	4 50	
Forfeited bail moneys	3,500 00	
		$5,466 34

District Court.

State cases, fines	$2,370 00	
Witness fees	421 92	
Interpreter's fees	9 96	
Sheriff's fees	109 10	
Justice's fees	5 51	
Constable's fees	9 31	
Jurors' fees	386 86	
$5.00 deposits and reporter's fees	1,091 65	
City cases, penalties	3,843 00	
Clerk's fees	588 15	
Interpreter's fees	7 64	
		8,842 10
		$14,308 44

To these were added certain other items of witness fees in both courts aggregating $923.85, making the entire sum $15,232.29. From this were deducted certain credits which represented moneys left by Woller in the drawer and at the bank, leaving a balance as found by the court due on the bond of $12,365.52. Judgment was thereupon rendered against the surety for the penalty of the bond, with interest from the day of demand, and from that judgment this appeal is taken.

For the appellant there were briefs by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

WINSLOW, C. J. The appellant makes two general contentions: (1) that there can be no liability on the bond for any moneys which came into Woller's hands as clerk of the district court, because the bond only covers his acts as clerk of the municipal court; (2) that no moneys other than those due the city of *Milwaukee* can be recovered in any event.

1. The first contention must be overruled. Had Woller held two separate offices, for each of which he was required to give bond, or had he been required by law to give a separate bond to cover his duties as clerk of the district court, doubtless the bond in suit could not be held to cover a breach in the last named duties. *Milwaukee Co. v. Ehlers,* 45 Wis. 281; *People v. Edwards,* 9 Cal. 286; *People v. Gardner,* 55 Cal. 304; *Cooper v. People,* 85 Ill. 417. If, on the other hand, the effect of the provisions in the district court act is simply to impose some additional duties on the clerk of the municipal court, his bondsmen as such last named clerk are liable on his bond for his nonperformance of those duties, because they were a part of the duties of his office as clerk of the municipal court. *Van Valkenbergh v. Paterson,* 47 N. J. Law, 146; *Tieman v. Haw,* 49 Iowa, 312; *State v. Matthews,* 57 Miss. 1; *Clay Co. v. Simonsen,* 1 Dak. 387. It is very clear to us from examination of the district court act that it was not intended thereby to create two offices, but simply to add duties to the office of the clerk of the municipal court. The clause expressly providing that he shall receive no fees for the performance of these new duties and the absence of any requirement of an additional bond or oath of office are very signifi-

cant in this connection, as well as the fact that the new court was in fact a court created to relieve the municipal court of its lesser business, and thus the clerk of the municipal court was simply required to perform a part of his former duties in a separate tribunal and not really to assume any additional duties.

2. In support of the second contention a number of arguments are advanced. It is said in the first place that the bond by its terms is only a bond indemnifying the city of *Milwaukee* from damage; and that as the city is not required to pay over any of the moneys belonging to the county or other persons until its treasurer has received the same, it can have suffered no damage except from the failure to pay over the moneys which belong in the city treasury, namely, the penalties and clerk's fees in city prosecutions in the district court, amounting to $4,431.15.

This argument seems to ignore entirely the very first condition of the bond, which is that Woller "shall well and faithfully *in all things* execute and discharge the duties" of his office "without any fraud, neglect or omission." After this clause follows in the conjunctive the condition to indemnify the city against damage from his acts or neglect. As one of his statutory duties was to pay over to the city treasurer all the moneys with which he is charged by the judgment, whether belonging to the city, the county, or to witnesses, it seems certain that the bond by its terms covers all the clerk's duties and not alone mere indemnity to the city against money loss suffered by it.

But it is urged that the bond is not conditioned as the statute requires and hence is not an official bond but only a voluntary bond. From this premise it is further urged that, even admitting that recovery might be had by the city upon an official bond for sums due to others than the city itself, because such a bond would be helped out by the statute, still a mere

voluntary bond, like the present, can receive no such help and can only protect the city itself from loss.

It is true that the bond in suit differs in verbiage from the bond required by the statute. The bond in suit is conditioned for the due performance of *all the duties* of the clerk, one of which duties is to pay over to the city treasury all sums due to the city, as well as the sums due to the county and to witnesses. The condition of the bond required by the statute is only that he pay to the city treasurer the sums last mentioned. The bond actually given covers all the clerk's duties; the bond required by statute covers but one. The difficulty with the bond given is, therefore, not that it does not cover what the statute requires, but that it covers what the statute requires and more. Does this deprive it of its character as a statutory bond so far as it embodies statutory conditions? In reason and in justice we think not, when there is no claim that the excessive conditions of the bond were inserted under duress. The surplusage will be rejected and the bond sustained as to the statutory conditions which it includes.

This subject is quite fully treated and the authorities supporting the conclusion we now reach are cited in *State v. Purcell,* 31 W. Va. 44, 5 S. E. 301. See, also, to the same effect, 2 Brandt, Suretyship & G. (3d ed.) § 617; Murfree, Official Bonds, § 61.

Being an official and statutory bond to the extent that it includes statutory conditions, the liability so far as such conditions are concerned is to be construed and enforced with the aid and in the light of all the statutory provisions bearing thereon. The statute which made it the clerk's duty to pay over all the moneys in question into the city treasury, regardless of the question of their ultimate disposal, provided that the bond to secure the performance of this duty should be executed and delivered *to the city,* thus expressly constituting the city as the obligee and necessarily the proper party to maintain an

action on the bond for breach of any of its conditions. While the Code requires that actions shall be brought in the name of the real party in interest (sec. 2605, Stats. 1898), the present case is unquestionably brought by the statute within the provisions of sec. 2607, which authorizes the trustee of an express trust or a person expressly authorized by statute to sue without joining with him the person for whose benefit the action is brought. *State v. Wettstein,* 64 Wis. 234, 25 N. W. 34.

Finally it is said that there could be no recovery for forfeited bail money in state cases in the municipal court, because by sec. 4816, Stats. (1898), such moneys are required to be paid into the county treasury. The answer to this proposition is that by ch. 36 of the Laws of 1897, being an act applying specially to the municipal court of Milwaukee county, the clerk of the municipal court is required to pay such forfeited bail moneys to the city treasurer. Sec. 4816, above referred to, first appeared in the Revised Statutes of 1878, and was simply re-enacted without change in the Statutes of 1898. Such re-enactment worked no change in the existing law, but simply continued the situation as it was before. *Glentz v. State,* 38 Wis. 549; *State ex rel. Ohlenforst v. Beck,* 139 Wis. 37, 119 N. W. 300. The Milwaukee municipal court had been excepted from the provisions of sec. 4816 when that section was re-enacted in 1898, and remained excepted notwithstanding the re-enactment.

By the Court.—Judgment affirmed.

UMBREIT, Respondent, vs. AMERICAN BONDING COMPANY OF BALTIMORE, Appellant.

January 10—January 31, 1911.

Injunction bond: Liability of surety: By what law governed: State and federal courts: Payment of damages "awarded."

1. **The liability of a surety on an injunction bond given in a suit in a federal court pursuant to a law of the United States is governed by the principles adopted and applied by the federal courts, not by the state law.**
2. **Under the laws of the United States as expounded by its courts the condition of a bond for payment of such damages as may be *awarded* by reason of the issuance or continuance of an injunction is not broken so as to make the surety liable until the amount of the damages is assessed and determined and the principal obligor has refused to pay the amount awarded.**

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

The complaint in substance sets forth that one Albert W. May commenced an action in the United States circuit court for the Eastern district of Wisconsin against the plaintiff, praying for an accounting for the proceeds of a judgment in the custody of the clerk of the circuit court for Milwaukee county, Wisconsin; that an order was entered directing said clerk to retain the proceeds of said judgment during the pendency of such action, and an injunction bond in the usual form was given; that thereafter a final decree was entered in said action, dismissing the bill of complaint for want of equity and directing the temporary injunction theretofore issued in said suit to remain in force for thirty days so that a *supersedeas* bond might be filed for the purpose of an appeal, if said May so elected; that thereafter said May applied to the court for an appeal from said decree, and the court directed that such appeal be allowed upon said May giving a bond according to law in the sum of $750, "which bond should operate as a *supersedeas* bond to continue in force the temporary injunc-

tion theretofore issued during the pendency of said appeal;" that said May, with the defendant in this action as surety, executed and filed a *supersedeas* bond approved by the judge of the court, a copy of which is made a part of the complaint; that said action was determined by the United States circuit court of appeals for the Seventh circuit and the decision of the lower court was affirmed; that plaintiff sustained damages by reason of said injunction to the amount of $584.59, no part of which has been paid; and that Albert W. May is a nonresident without the jurisdiction of the court in which the action was brought and is an insolvent. A bill of particulars was attached to the complaint showing the various items that went to make up the aggregate amount of damages claimed. The bond was in the sum of $750. The condition of the bond was that "if the said Albert W. May shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against him if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue. This bond shall operate as a *supersedeas* bond."

To this complaint the defendant interposed a general demurrer on the ground that the complaint did not set forth facts sufficient to constitute a cause of action. An order was entered overruling such demurrer, and from such order this appeal is taken.

For the appellant there was a brief by *Churchill, Bennett & Churchill,* attorneys, and *Warren B. Wilson,* of counsel, and oral argument by *Mr. W. H. Churchill* and *Mr. Wilson.*

For the respondent there was a brief by *Joseph B. Doe,* attorney, and *A. C. Umbreit, in pro. per.,* and oral argument by *Mr. Doe.*

BARNES, J. The liability of a surety on an injunction bond given in a suit in the federal courts pursuant to a law of the United States is not governed by the local law of a par-

ticular state, but is governed by the principles of jurisprudence adopted and applied by the federal courts. *Bein v. Heath,* 12 How. 168; *Tullock v. Mulvane,* 184 U. S. 497, 513, 22 Sup. Ct. 372. By the laws of the United States as expounded by its courts, where the surety undertakes to pay such damages as may be *"awarded"* by reason of the issuance or continuance of an injunction, there is no breach of the condition of the bond as to the surety until the amount of the damages is assessed and determined by a court of competent jurisdiction, or in some other lawful way, and the principal obligor has refused to pay the amount awarded; and no action can be maintained on the bond against the surety in the absence of such assessment. *Bein v. Heath, supra; Deakin v. Lea,* 11 Biss. 34, 38. It is the duty of this court to declare the federal law as it finds it, and what is here decided has no application to bonds given in actions and proceedings in the courts of this state. In view of what has been said, it is unnecessary to determine whether the complaint shows the bond sued on to be only an ordinary *supersedeas* bond or a *supersedeas* and injunction bond combined, and we do not determine that question.

The action is not brought on an award and the complaint shows affirmatively that none has been made. It follows that the complaint does not state a cause of action against the surety and that it was error to overrule the demurrer.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to enter an order sustaining the demurrer.

BRINILSON, Administrator, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 10—January 31, 1911.

Negligence: Dangerous premises: Railroads: Steam pit in breakwater used as walk: Duty to licensees: Want of repair: Notice: Death of child: Contributory negligence.

1. Where a railway company whose track ran along the shore of Lake Michigan had constructed outside of such track a breakwater covered on top with planking which formed a firm and even walk or pathway, access to which from the street was unobstructed, and to the knowledge of the company's agents and servants such planked surface was used by the public as a pathway or walk and by boys as a place for boating, fishing, and swimming, the persons making such customary use of the premises were licensees, having implied permission so to use them, and not trespassers.
2. Under such circumstances a licensee must be deemed to take the premises as he finds them, and the licensor owes him no duty except to refrain from acts of active negligence rendering the premises dangerous.
3. Where in such breakwater the railway company had constructed a steam and hot-water pit, five feet in diameter at the top and six or seven feet deep, covered like the rest of the breakwater with planking, and had suffered a large hole in the covering, caused by the removal of one of the planks, to remain a long time unrepaired, and such hole was not readily observable, being obscured by the steam rising through it and through the cracks between the other planks, the company was guilty of active and actionable negligence rendering it liable for the death of a boy five and one-half years old who, while walking with an older brother along the plank covering of the breakwater, fell through the hole into the steam pit.
4. Evidence that persons had observed such hole at various times, from three months before the accident down to the day thereof, warranted the jury in finding that the railway company was negligent in failing to discover the hole and repair it.
5. In view of the tender age of the deceased and of the surrounding conditions, it cannot be held as matter of law that he was guilty of contributory negligence in not observing and avoiding the hole.

APPEAL from a judgment of the circuit court fo
kee county: OREN T. WILLIAMS, Circuit Judge.

The plaintiff's intestate, a boy of the age of five
half years, on February 22, 1906, fell into a steam
water pit constructed by the defendant in a breakwa
it maintained to protect its property along the shor
Michigan in the city of Milwaukee. The boy was
scalded by the steam and hot water discharged int
from the roundhouse of the defendant near by that h
March 5, 1906. The pit into which the boy fell w
center of a crib in the breakwater, was about three f
ameter at the bottom, possibly five feet in diameter a
and six or seven feet deep. In the previous Octobe
fendant had removed the stone from the crib so as to
pit above described and had laid an underground
from its roundhouse to the center of the pit. The pit
ered by planks which were a part of the planking cov
breakwater. The child fell into the pit through an
about a foot wide and from six to seven feet long ma
removal of part of a plank of that size in the breakw
ering. The boy and an older brother were walking
of the breakwater and into the railroad yards, wh
looked for tin plates and some colored glass thrown
dining cars of the defendant.

The complaint alleges that the breakwater was
pleasant promenade by being covered with planking
obstructions were so placed as to prevent its use by th
and that people were not excluded from walking upo
is alleged that the death of the boy was due to the n
of the defendant in permitting a dangerous hole to ex
covering of the pit in the manner stated, and dam
asked for the death of the boy thus caused and for
and suffering endured by him in consequence of his
during his lifetime.

The evidence tends to show that the defendant's a

servants knew that the public were using the breakwater and the adjacent grounds for walking, fishing, and swimming, but that notices of "No thoroughfare" were posted to warn people off of the tracks, and that people, boys particularly, were expelled from the tracks.

The breakwater extends north from Polk street. The evidence as to whether or not a fence extending east from a building belonging to the defendant along the north line of Polk street extended over the breakwater at the time of the accident is in conflict.

There was evidence that the hole in the planking on the breakwater had existed for some weeks before and up to the time of the accident and that it was a dangerous trap to persons walking on the breakwater. Various witnesses testified that they had seen the hole in the covering of the breakwater two or three months before the accident, a month or two before the accident, two weeks before it, and also on the day before the accident. There was evidence tending to show that this opening was difficult to see because of the steam arising from the hole and from the cracks between the other planks, and because of the conditions surrounding it.

The jury found that the defendant was negligent and that it caused the injury, and awarded damages. This is an appeal from the judgment on the verdict in plaintiff's favor.

William G. Wheeler, for the appellant.

For the respondent there was a brief by *Norman L. Baker* and *W. J. Zimmers,* and oral argument by *Mr. Baker.*

SIEBECKER, J. The appellant avers that the place where the boy was injured is its property. This the respondent denies, and asserts that the place of injury is located on the bed of Lake Michigan, and hence not within the boundaries of the appellant's private grounds. In the view we take of the case this question need not necessarily be considered in determining the issues raised and we therefore do not decide this controversy between the parties.

It is undisputed that the appellant maintained a b
at the place designated to protect its grounds from
of the waters of the lake; that it had filled with eart
between the breakwater and the dry land; and that i
occupied this area for railroad purposes. As appe
above statement of facts, the appellant had covered t
of the breakwater with planking which formed a
even walk or pathway along and above the waters o
which was used by the public as a footpath to pass a
over these grounds and for walking along the edge o
Boys had made a practice of so using it and as a
boating, fishing, and swimming. The evidence fully
the jury in finding that appellant's agents and serva
that the premises were being so used. It appears t
was a fence along the south line of appellant's groun
ting on Polk street, but the evidence is in conflict as t
or not the fence extended onto the breakwater, and
may well have found that this end of the breakwate
obstructed and open so that people could pass with
ference in going to and from the street onto the
grounds, and that an open passageway over the br
was thus afforded them. In the light of such facts
cumstances it cannot be said that persons who passed
breakwater and adjacent grounds were there under
bidding circumstances as to make them trespassers.
reasonably clear that people customarily used this p
footpath and that boys especially used it as a plac
purposes of boating and swimming. These uses of t
ises must be held to have been within the knowled
railroad's agents and servants and that an implied p
existed which justified persons in so using the break
adjacent grounds. Under these circumstances the p
passing over this place on these premises cannot be c
trespassers; they must be considered as having ent
the premises with the implied permission of the rail
pany for the customary purposes. The license to s

premises implies permission to so use them, and the railroad company cannot now be heard to charge that such use constitutes a trespass. Under these circumstances persons making such customary use of the premises are licensees.

The evidence sustains the claim that the decedent, at the time of injury, was using this place in the customary way, namely, as a footpath in passing over the breakwater, and his relation to the railroad company was that of a licensee. See *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191; *Gorr v. Mittlestaedt,* 96 Wis. 296, 71 N. W. 656; *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800. With this relation existing between the appellant and the decedent, the legal duty devolving on the company is as recognized and declared in the *Muench Case,* that a licensee must be deemed to take the premises as he finds them, "and the licensor owes him no duty, save to refrain from acts of active negligence rendering the premises dangerous." The case of *Klix v. Nieman,* 68 Wis. 271, 32 N. W. 223, is not at variance with this rule. The facts of that case show that the danger complained of was one connected with an unfenced natural pond on a private lot, but so remote from the street and sidewalk as not to make their use dangerous; nor was it shown that the owner had done anything to this pond to create a pitfall or snare liable to injure persons going onto the lot. In the instant case the facts are different, in that the alleged dangerous condition was created by the company, and the question is whether or not, in view of the fact that the company knew or ought to have known that both adults and children were resorting to and using the place for travel and amusement, the omission to keep the pit covered created a danger likely to cause injury to persons so using the premises with ordinary care. That the opening or hole in the cover of the steam pit, as described in the evidence, was dangerous seems self-evident from its very nature and condition. It is also clear that the hole in the planking that covered the excavation was not readily observed, and was ob-

scured by the steam rising therefrom through this hol the cracks between the planks covering the pit. This c tion of the place made the pit a dangerous trap or pitf persons on the premises, and the omission to observe an pair the planking constitutes active negligence on the pa the railroad toward them.

It is contended that it is not shown that the company negligent in permitting this hole to exist, because it ha notice or knowledge thereof prior to the day of the acci The evidence discloses that a hole had been observed b rious persons two or three months, one month, two weeks on the day before the accident. These evidentiary facts nish a sufficient basis for the conclusion of the jury tha railroad company was guilty of a want of ordinary ca failing to discover the hole in the plank covering ove steam pit and in neglecting to repair it before the time o accident.

It is probable that the decedent had not observed the His conduct in this respect must be viewed in the light o age and the surrounding conditions and of the danger, when so considered it cannot be held as matter of law to s that he was guilty of contributory negligence in produ the injuries complained of. Cases illustrating the princ and grounds of liability under the circumstances discl here are *Kinchlow v. Midland E. Co.* 57 Kan. 374, 46 703; *Penso v. McCormick,* 125 Ind. 116, 25 N. E. 156; *ion Pac. R. Co. v. McDonald,* 152 U. S. 262, 14 Sup. Ct.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

PEARSON, Respondent, vs. SCHOOL DISTRICT NUMBER 8 OF THE TOWN OF GREENFIELD, MILWAUKEE COUNTY, WISCONSIN, Appellant.

January 10—January 31, 1911.

Schools and school districts: Oral contract with teacher: Validity.

1. A school district board has no power to contract with a teacher otherwise than as provided by the statute.
2. An oral contract made by a school district board with a teacher is valid in the absence of any statutory requirement that it be in writing.
3. The provision in sec. 438, Stats. (1898), that the contract with a teacher, with a copy of the teacher's certificate attached thereto, shall be filed with the clerk, is directory only, relating to a detail of the keeping of a record, and does not preclude the making of a valid oral contract.

MARSHALL, J., WINSLOW, C. J., and BARNES, J., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This action was brought to recover damages for breach of contract. The plaintiff was a duly qualified teacher in Milwaukee county, Wisconsin, and the defendant a duly organized school district. The plaintiff's complaint is based upon an alleged contract with the defendant to teach its school for one year and that the defendant breached the contract, in consequence of which plaintiff sustained damages. The defendant claims that the contract was void because not in writing. The jury returned the following verdict:

"(1) Did the school board at a meeting lawfully convened, at which all members were present, authorize the employment of the plaintiff as the teacher of the district school in the defendant's district for the school year of 1907? *A.* Yes.

"(2) Did the clerk of said school district, pursuant to the authority as stated in question No. 1, make a proposition to the plaintiff to teach said district school for the school year 1907 on the same terms and conditions as contained in the

written contract between the plaintiff and defendant f year 1906? *A.* Yes.

"(3) If you answer question No. 2 'Yes,' then: D plaintiff accept said proposition? *A.* Yes.

"(4) If you answer questions Nos. 2 and 3 in the a tive, was said agreement reduced to writing? *A.* (l court). No.

"(5) If you answer questions 2 and 3 in the affirm was the agreement between the parties revoked by mutu sent? *A.* No.

"(6) If you answer questions Nos. 2 and 3 in the af tive, was the conduct of the plaintiff thereafter such as t tify the defendant in reasonably inferring that the pl withdrew from the contract? *A.* No.

"(7) If the court shall be of the opinion that the pl is entitled to recover, at what sum do you assess her dam *A.* $327.52."

The court on defendant's motion refused to change t swers in the special verdict and ordered judgment for p iff. Judgment was entered accordingly, from which th peal was taken.

The cause was submitted for the appellant on the bri *Froede & Bodenstab,* and for the respondent on that of *& Otjen.*

The following opinion was filed January 31, 1911:

KERWIN, J. The only question here is whether the tract alleged to have been made between the plaintiff an fendant is valid. That question turns upon whether sec. Stats. (1898), requires the contract to be in writing. contract by its terms was to be performed within one from the time of making thereof. But it is argued by sel for appellant that the district board is required to st follow the statute, and that it has no power to contract o wise than as provided by the statute. This may be gra and the question then arises whether the board in makin alleged contract did follow the statute. It is established

out dispute that it did, unless it was necessary under the provisions of the statute that the contract be in writing in order to bind the defendant. Counsel for appellant relies on *McNolty v. Board of School Directors,* 102 Wis. 261, 78 N. W. 439, to the point that "the powers of school district officers are limited, and can only be exercised as the statute provides, and the plaintiff is legally charged with notice of the extent of such powers and the manner in which they must be exercised." But the case does not reach the point here. In that case it was established that the statute had not been complied with. Here it has been strictly complied with if it was not necessary that the contract be in writing, and it is not necessary unless the statute so provides. The statute reads:

"The board shall contract with qualified teachers, specify in the contract the wages per week, month or year to be paid, and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk. No contract with any person not holding a diploma or certificate authorizing him to teach shall be valid; and all such contracts shall terminate if the authority to teach expire by limitation and be not renewed or be revoked." Sec. 438, Stats. (1898).

Appellant relied upon the provision, "and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk," and contends that no other conclusion can be drawn from this provision than that it means that the contract must be in writing. But the statute does not say that the contract must be in writing, and the court cannot read into the statute provisions not found there for the purpose of rendering an oral contract, otherwise unobjectionable, void because not in writing, in the absence of express statutory requirement. An oral contract by a school teacher with a municipality or school district is valid in the absence of requirement that it be in writing. *Roberts v. Clay City,* 102 Ky. 88, 42 S. W. 909; *Jackson School Tp. v. Shera,* 8 Ind. App. 330, 35 N. E. 842. The provision relied upon by appellant is at best only directory. 2 Lewis's

Sutherland, Stat. Constr. (2d ed.) § 611 (447); *McShane v. School Dist.* 70 Mo. App. 624, 628; *Bladen v. Philadelphia,* 60 Pa. St. 464. It is a detail respecting the keeping of a record, and not a limitation on the power to make an oral contract. If the legislature intended that such a contract should be void if not in writing it would have so declared, as is obvious from other statutory provisions. Statutes in this state rendering contracts void because not in writing expressly so provide. Secs. 2302, 2304, 2307, 2308, Stats. (1898). Also we find by the terms of sec. 529, Stats. (1898), respecting township system of school government, which does not apply to the instant case, an express provision that the contract shall be in writing. Sec. 432, Stats. (1898), provides that the director, treasurer, and clerk shall constitute the district board, and further provides how meetings shall be held and that no act authorized to be done shall be valid unless voted at its meeting. Here the board did meet and vote to hire the plaintiff, who was a qualified teacher holding a diploma or certificate, and specified the wages to be paid and the term of service. The plaintiff accepted the terms and assented to the proposition of the defendant. This constituted a good contract at common law, and must be upheld unless the statute changes the rule of the common law. It needs no citation of authority to the point that statutes in derogation of the common law must be strictly construed. Courts cannot by judicial construction read into statutes provisions not found there for the purpose of changing the rules of the common law.

It follows, therefore, that the contract in question was valid.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed February 15, 1911:

MARSHALL, J. (*dissenting*). In my judgment the conclusion reached in this case is clearly wrong.

At the outset it is conceded that the validity of the contract

depends on whether the statute was strictly followed. That concession was unavoidable since this court, in terms or effect, has so held, notably in *McNolty v. Board of School Directors*, 102 Wis. 261, 78 N. W. 439. There it was held that school district officers can only make a valid contract with a teacher by complying strictly with the statute. That was later emphasized in *Manthey v. School Dist.* 106 Wis. 340, 82 N. W. 132, the court adjudging a contract, so called, void for failure to so comply. We need not pursue this branch of the case. The principle is elementary. The only fault I find with the majority opinion in respect thereto is that it was not emphasized and given controlling dignity instead of being merely conceded for the occasion and as a basis for the logic indulged in.

Now as to the logic. The first infirmity is failure to appreciate that by the common law, as we speak of it ordinarily, contracts with municipalities to be valid were required to be in writing. That is so familiar I will not suggest need of supporting it by referring to authorities. It is only in recent times, the common law has been modified so as to enable public contracts to be made in parol. Such being the case the rule of construction referred to by the court was improperly applied.

True, a statute in derogation of the common law, generally speaking, is to be strictly construed against change in established conditions. But that does not suggest that every such statute is to be construed. It means only that where, under all the circumstances, the statute is reasonably open to two constructions, one not changing established rules of conduct is to be preferred to another equally or less reasonable which does. Under no circumstances does it justify construing a statute which is not ambiguous for the purpose of avoiding its obvious effect, or to such end adopting any meaning which cannot be sanctioned by reason and common sense. Above all, it obtains rather with reference to the common law of England

supplemented for this country by such portions of the written law of the mother country as were, by the unwritten method, adopted here, not with reference to mere modern unwritten departures therefrom. Moreover, such dignity as the rule has, which seems to have been the chief reliance of the court, should have led to the opposite result from the one reached, since, as stated, a statute requiring such a contract as the one in question to be in writing to be valid, would be in strict harmony with the old common law.

The second infirmity with the court's logic is in assuming that the statute in question is ambiguous. The reasoning seems to carry the idea that a statute is necessarily uncertain and so open to construction if anything material is expressed otherwise than unmistakably in the letter. That is contrary to a very familiar rule,—one many times declared and applied, and very recently. Those things which are necessarily implied in a writing are a part of the same as if clearly expressed in the letter. I will not take time to refer to authorities in support of such a familiar proposition. The logic of this opinion I aim to base on principles too familiar to warrant extending the length of it by citations.

Starting with the false premises mentioned, viz.: (a) that the common law formerly did not require a public contract to be in writing, therefore that the statute should be strictly construed in harmony therewith; (b) that such statute is ambiguous; and we might well add (c) that if open to construction it can reasonably be read as not requiring the contract to be in writing,—it was not difficult for the court to concede for the purposes of the case, that the agreement in question is void, if the statute requires such to be in writing, and yet hold it valid.

Conceding, says the court in substance, that under *McNolty v. Board of School Directors,* 102 Wis. 261, 78 N. W. 439, the contract is void if the statute was not strictly complied with, the statute was so complied with here "if it was not necessary

that the contract be in writing, and it is not necessary unless the statute so provides. The statute reads: 'The board shall contract with qualified teachers, *specify* in the contract the wages per week, month or year to be paid, *and when completed* file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk,' " etc. Sec. 438, Stats. (1898).

How one could face that language in quoting it and yet conclude that it does not require the contract to be in writing, passes my comprehension. In this matter I mean no disrespect to my brethren who concurred in the opinion, but I must, in order to do my full duty in writing this dissent, say I cannot understand the logic. After quoting, the court proceeded: "Appellant relied upon the provision 'and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk,' and contends that no other conclusion can be drawn from this provision than that it means that the contract must be in writing. But the statute does not say that the contract must be in writing." Why, pray, does the statute not say the contract must be in writing? Does the court mean that the only way the lawmaking power could so say would be to use the word "writing?" Can it be that the court means, if a statute is so framed that it cannot by any possibility be complied with unless the thing required is done in a particular way, that it yet does not unambiguously command accordingly? If so, what is to become of the supposed rules of logic by means of which truths are presented, as we are taught, in the aspect of demonstration? We cannot think the language of the court at this point was used with due consideration. Why did not counsel rightly contend that no other conclusion can be drawn from this provision than that it means that the contract must be in writing? Does not the statute which requires a chattel mortgage to be filed with the town clerk in order to be binding, except as between the parties, require it to be in writing in order

to be binding on a third person? If parties contract subject to a termination of the agreement by service of a notice thereof by mail, does not the agreement require the notice to be in writing? The impossibility of a negative answer being correct to either question, it seems, suggests the proper one. The statute requires the contract to have "attached thereto" the teacher's certificate. How could such a certificate be attached to a verbal contract? It requires certain things to be "specified in the contract." It requires the contract when completed with a copy of the certificate of the teacher to be filed. How can a verbal contract be filed in a public office? No one of those things, particularly the first and the last, could possibly be done without the contract being in writing. That seems as certain as that two things, each of which is equal to a third, are equal to each other.

Is that not unanswerable? Am I not justified in my astonishment, as I view the quotation of the statute, followed by the court's conclusion that a written contract is not required thereby? Facing the pains the court must have taken with its logic before venturing to ground a judgment upon it, and at the same time the aspect of the statute as seen by me, dominated strongly as I am by respect for the views of my brethren, if I stood alone I might tend to fall into uncertainty as to whether the mental compass, ordinarily enabling me to comprehend common forms of expression pretty clearly, has been dependable in the particular situation.

Proceeding, the court says, reasoning from absence of the word "writing" from the statute: "The court cannot read into the statute provisions not found there for the purpose of rendering an oral contract, otherwise unobjectionable, void because not in writing, in the absence of express statutory requirement." Here again I do not understand. Was it intended that counsel for appellant, or any one, thought of reading into the statute any provision for any purpose, much less to render a contract void? Is the common thing of read-

ing out of the statute the idea thought to be there by necessary inference an attempt to read into the statute anything not there? Was the intention that a statute could not expressly require a contract to be in writing in any other way than by using the word "writing"? But I will not pursue this further. I leave it believing that enough has been said, if anything were required other than to merely point to the plain language of the statute, to show that it expressly requires such contracts as that in question to be in writing as plainly as that could be done.

If the statute were ambiguous and so open to construction no argument is needed to show that the same result would be reached as before. First, formerly such contracts, as we have said, were required to be in writing; second, public policy so requires, for which reason courts have leaned to the view that the written law so commands where either language to that effect is used or the law cannot be executed otherwise than by reducing the contract to writing; third, because by practical construction of the statute for half a century or more, if construction were required, it commands such contracts to be in writing.

The foregoing second proposition could be well illustrated by reference to many adjudications. We will refer to two only. In Indiana the statute does not require, specifically, things to be done respecting such contracts which can only be done by reducing the agreement to writing, but does, as a part of the prescribed duties of the keeper of the official records, use language indicating that it includes contracts with teachers, though not mentioning them. The latter provision is widely separated from the one relating to the contracting power. Judge ELLIOTT, speaking for the court in *Fairplay Tp. v. O'Neal,* 127 Ind. 95, 26 N. E. 636, said:

"It is . . . not altogether clear that the statute does not require that all contracts shall be in writing . . . but we do not deem it necessary to decide the question."

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lished many years ago, contained a form of contract with suggestive features for its execution referring to the section of the statutes under consideration.

It is said that in case of a legislative purpose that a contract shall be void unless in writing, the statute so declares. No authority is cited to that as to public contracts, and I venture to say there is none. The authorities are at least substantially, if not universally, the other way as to decided cases and elementary works as well. *Perkins v. Ind. School Dist.* 99 Mo. App. 483; *Head v. Providence Ins. Co.* 2 Cranch, 127; *Wade v. Newbern,* 77 N. C. 460; *Logansport v. Blakemore,* 17 Ind. 318; *Starkey v. Minneapolis,* 19 Minn. 203; *Aurora W. Co. v. Aurora,* 129 Mo. 540, 31 S. W. 946; *Crutchfield v. Warrensburg,* 30 Mo. App. 456; *McDonald v. Mayor, etc.* 68 N. Y. 23; *Stuart v. Cambridge,* 125 Mass. 102; 1 Smith, Modern Law of Corp. § 263; 1 Beach, Pub. Corp. § 253; Dillon, Mun. Corp. § 373; *Terry v. Board of Ed.* 84 Mo. App. 21; 35 Cyc. 957; 20 Am. & Eng. Ency. of Law (2d ed.) 1164.

In all these authorities it is held that where the statute requires public contracts to be in writing one otherwise made is void. Many instances will be found where recovery after performance even on a *quantum meruit* was denied. Nowhere is it suggested, at least in any well considered case, that a contract not made in compliance with the statute is nevertheless valid, unless declared by the written law to be void. A distinction is made in the books between a conferred power, as in case of that of a municipality to contract, and a regulated power such as that to make contracts in general. In the latter failure to comply with the statutory regulations not expressly declared in the statute to be fatal, in some cases is held to render the agreement void and in others not, according to the supposed legislative purpose, but as to the former the extent of the power itself is measured by the terms of the statute including those in regard to its execution. So where

the statute requires a public contract to be in writing the power to contract is conditioned, necessarily, upon its being exercised in the manner indicated. Such is the philosophy of the law as it will be universally found stated, I venture to say, in the books.

The court seems to have overlooked the foregoing or would not have so easily engrafted upon our system the novel idea that a public contract required by statute to be in writing need not necessarily be made that way in order to be valid, referring to secs. 2302, 2304, 2307, and 2308 of the statutes relating to contracts in general respecting real estate and contracts within the statutes of frauds which I must say have no application to the subject under discussion.

Attention is called in the court's opinion to sec. 529, Stats. (1898), relating to contracts with teachers under the township system, which requires them to be in writing. True, but such section does not provide that such contracts shall be void unless in writing, so by the logic of the court that result would not follow from a failure to obey the law. Again it must be remembered that section is new as compared with the one under discussion. It was adopted in the light of over twenty years of administration of the latter and was worded substantially the same as that had always been understood and evidently with the intention of including the same essentials as were embodied in the old statute.

The closing part of the court's opinion seems to be a key to the whole. There the idea with which the opinion opens is reiterated and emphasized, *i. e.* that the statute is in derogation of the common law and so a strict construction should be resorted to avoiding any change if possible. The force of the rule, as we have seen, where applicable at all is not to the extent suggested, while the trend of judicial thought is rather toward a construction of the written law requiring public contracts to be in writing than otherwise, in harmony with the ancient common law. The misconception as to that and fail-

ure to distinguish between adjudications respecting contracts in general and public contracts, and the basis thereof, in that the latter involves power by grant and the former power by natural right which the written law merely regulates, led naturally to the result from which I dissent. I have no fear but that the departure from principle will be rectified at the first good opportunity. The looseness in public affairs which the decision sets a mark for in the particular field may be easily avoided by legislative action.

WINSLOW, C. J., and BARNES, J. We concur in the foregoing.

NOBLE, Respondent, vs. LIBBY, Appellant.

January 10—January 31, 1911.

Appeal: Issues: Nature of action: Deceit: Money had and received: Contracts for services: Skill and diligence: Mistakes: Breach: Damages.

1. Notwithstanding confusion and uncertainty in the pleadings, evidence, and instructions, this court will search the record and if a right of recovery upon any ground appears to exist will permit plaintiff to assert it and the defendant to interpose any defense he may have.
2. One who contracts to render services requiring skill and diligence impliedly undertakes that he possesses the requisite skill and that he will serve faithfully and diligently, but there is no implied agreement that he will commit no errors.
3. Where there has been no fraud, actual or constructive, and where no money of the employer of any ascertainable amount has come into the hands of the employee, there is no legal liability of the latter for deceit or for money had and received, although there may have been a breach of the contract of service in that the employee did not serve faithfully or with the requisite skill and diligence.
4. Where defendant was employed by plaintiff to aid in locating certain valuable timber lands and entering them by proper description under the Stone and Timber Act (20 U. S. Stats. at

Large, ch. 151, p. 89), and through defendant's failure to exercise the requisite skill and diligence plaintiff failed to enter the lands intended, plaintiff is not necessarily entitled to recover the whole amount which he paid out to a third person for informing him of the existence of said lands and for pointing them out.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Gruenewald, Jackson & Gruenewald,* and oral argument by *W. F. Gruenewald* and *H. B. Jackson.*

For the respondent there was a brief by *B. E. Van Keuren,* attorney, and *Charles H. Forward,* of counsel, and oral argument by *Mr. Van Keuren.*

TIMLIN, J. It might be said of this case, "Confusion here hath found its masterpiece." From the drafting of the complaint through the trial in the court below up to the final argument in this court such uncertainty exists that the counsel for plaintiff and respondent is unable to state the nature of the action, insisting that it may be an action for money had and received, an action at law to recover damages for breach of contract, or an action in equity; while the trial court at the opening of the trial first declared it an action in tort, after the trial had made considerable progress declared he did not know whether it was an action in tort or upon contract, and at the close of the evidence of the plaintiff on motion for nonsuit ruled as follows:

"Yesterday I was inclined to think, after reading it only once, that it was an action in tort. Today I do not find a single allegation in it that is characteristic of an action *ex delicto.* I am clearly of the opinion now that the complaint is upon implied contract."

But later on he instructed the jury as follows:

"In this case there is really but one question for you to determine: Did the plaintiff rely entirely upon the defendant in the selection and entry of the lands in question?"

At request of plaintiff he instructed:

"If the representations made by the defendant to the plaintiff were material and false, and the plaintiff did not know, or have present means of knowing, that they were false, and the plaintiff relied upon them as being true, and the defendant knew this, and the plaintiff suffered damages thereby, it is immaterial whether the defendant made the representations wilfully or intentionally or not; for he had no right to make even a mistake in facts so material to the contract, except under the penalty of responding in damages."

He also at request of defendant instructed the jury as follows:

"The plaintiff in this action cannot recover anything from the defendant unless you find that the defendant, or his agent, made false representations to the plaintiff. The plaintiff cannot recover in this action unless you find he actually relied upon the false representations of fact made by this defendant. The plaintiff cannot recover in this action unless you find that because of the defendant's misrepresentations, or those of his agent, the plaintiff parted with his money. To entitle the plaintiff to recover in this action, it must at least be shown from the evidence that the plaintiff has paid something to the defendant, or his agent, which in equity and good conscience he ought to return. There is in this case no question of fraud on the part of the defendant. Plaintiff does not complain or charge the defendant himself with any fraud or deceit in this case. Unless the proof shows to your satisfaction that the defendant, or his agent, made some false representations to the plaintiff upon which the plaintiff relied, and had a right to rely upon under other instructions given the jury, the plaintiff cannot recover in this action."

He also told the jury if they found for the plaintiff they must assess the damages at $350. Notwithstanding this confusion we are to search the pleadings and evidence, and, if a right of recovery upon any ground exists, permit the plaintiff to assert that right and the defendant to interpose against such assertion any legitimate defense he may have. The plaintiff as a witness acquitted the defendant of any fraud in

the matter. His testimony showed that he paid no money to the defendant, so that the right of recovery for deceit and that of recovery for money had and received both dropped out of the case, the former because there was no intentional deceit and the latter because the plaintiff had paid the defendant no money.

But it is contended that the judgment may be supported as a judgment for damages for breach of contract. The charge above quoted would be quite erroneous in such an action. The only contract which the evidence in any wise tends to support is a contract of service; that is to say, the defendant should perform services for the plaintiff in aiding the latter to locate government land. The evidence is quite weak and unsatisfactory with reference to any contract of employment, but there may be enough to take the case to the jury on this ground. This evidence tends to show that the defendant, answering a newspaper advertisement, was directed to one Taylor, with whom he had no previous acquaintance. Taylor professed to know of valuable timber lands which might be entered under the so-called Stone and Timber Act. The defendant undertook, without any express agreement for compensation, to aid the plaintiff in locating some government land under this act. The plaintiff informed the defendant that he, plaintiff, was ignorant of the business of locating lands and knew nothing about timber claims or about the surveyor's marks and was dependent absolutely upon the defendant. Defendant replied that he was not a timber estimator but did understand surveyors' marks, and would see that plaintiff was not deceived in his location. After examining some land shown to them by Taylor and what appeared to be marks of the government surveyor on trees, all parties went to the office of the register. Here, after some doubt on the part of defendant and some examination and discussion, defendant represented that the land which had been examined by plaintiff, defendant, and others and pointed out to them by

Taylor was covered by the description in question. It was understood that Taylor would be paid $350 for disclosing his knowledge of the existence and location of such valuable lands open to entry and for pointing them out, and defendant should get his pay from Taylor. Defendant afterward admitted that Taylor had paid him. But how much was not shown. After Taylor had shown plaintiff and defendant some desirable land and what purported to be government marks for the section corners, all parties returned to the register's office, and the plaintiff filed a declaration entitling him to publish that on a given day he would apply to purchase this tract under the act of Congress in question. It was here that the $350 was paid to Taylor with the knowledge and in the presence of the defendant. It does not appear whether the marks on the witness trees were spurious or were incorrectly read by Taylor or whether they conformed or failed to conform to the land declared upon. The answer admits that the land so shown to the plaintiff was not the land declared upon by the plaintiff at the land office. But the declaration preliminary to entry was filed and covered in fact land subject to such entry. The plaintiff never went to see this land last mentioned, never followed up the proceedings or obtained any title thereto, and there is no evidence of the value of the vacant government land described in plaintiff's declaration filed with the register. There is no evidence whether it was near to or remote from the land pointed out. Defendant concedes all these facts, but denies that he was employed by the plaintiff and that he made any misrepresentations, his version being that he assisted the plaintiff as a matter of courtesy or friendship to a neighbor or to another Wisconsin man in the West, and that he too was deceived, and that the most he said was that he believed the lands filed upon were identical with those examined.

This case is very like *Simmons v. Putnam,* 11 Wis. 193, where there was a contract binding the defendant to go upon

and survey lands of the United States about to be
the plaintiff and make good and judicious selectio
breach averred was that the defendant did not do
lected inferior lands. The measure of damages in
is the loss sustained by plaintiff by reason of enteri
ferior lands. If the lands actually entered were o
ity agreed, the plaintiff was not damaged even thou
ant did not examine the lands. But the plaintiff
of such contract might not necessarily recover
amount paid out by him, as directed in the instant c
instructions to the jury. *McKinnon v. Vollmar,* 7
43 N. W. 800, is not in point because that was an
recover from the vendors upon rescission the purch
paid to the vendor and the form of the action was n
and received. There is, however, if we are to cre
iff's testimony, in the case at bar an element of brea
tract additional to those existing in *Simmons v.*
supra, consisting of failure to locate the plaintiff
particular land shown to him by Taylor and selected
iff for location. The general rule of law with re
contracts of this kind is as follows:

"Whoever bargains to render services for anoth
takes for good faith and integrity, but he does not
he will commit no errors. For negligence, bad fai
honesty he would be liable to his employer, but, if he
of neither of these, the master or employer must
such incidental losses as may occur in the course o
ployment, because these are incident to all avocation
one, by any implication of law, ever undertakes to p
other against them." *Nelson v. C., M. & St. P.* 1
Wis. 320, 326, 19 N. W. 52, quoting from *Page v.*
Mich. 415; 26 Cyc. 969, 970.

If, however, the servant contracts for particular o
dinary skill or ability in the line of work, he must s
contract, and a higher degree of diligence and skill
quired of him. *Wenger v. Marty,* 135 Wis. 408, 116

"One who accepts employment to perform skilled labor impliedly undertakes that he possesses the requisite skill." *Norris v. Cargill,* 57 Wis. 251, 15 N. W. 148.

There may also be a fraudulent breach of the contract of service, as is shown by the rule that the employee owes to his employer the duty to serve him honestly and in good faith. This ground of liability is perhaps what the plaintiff was aiming at and more nearly fits the evidence in the case and the charges in the complaint than any other. It must be manifest that the real questions in the case, viz.: whether there was a contract of employment, whether the defendant faithfully and in good faith performed within the foregoing rules, and if he did not what was the amount of plaintiff's damages, were not properly submitted to or passed upon by the jury.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

CLUTE and another, Respondents, vs. CLINTONVILLE MUTUAL FIRE INSURANCE COMPANY and others, Appellants.

January 11—January 31, 1911.

(1, 5) *Appeal: Review: Estoppel: Bill of exceptions.* (2–7) *Fire insurance: Gasoline clause: Violation: Instructions to jury: Total or partial loss: Pleading: Amendment to conform to proof: Ownership of property: Evidence.*

1. A party who requests the submission of a question to the jury cannot on appeal assign such submission as error.
2. Evidence that one of the owners of a factory insured under a policy which by its terms became void if gasoline was kept, allowed, or used on the premises without consent, ordered five gallons of gasoline not intended for use in the factory or to be kept therein, but failed to direct where it should be sent, and that it was delivered at the factory while he was out, but on his return a few minutes later was set outside, where it remained about an hour until he went home at night, when he took it with him, does not show a violation of the policy.

3. In an action upon such policy instructions to the jur words "kept or allowed" did not refer to the temporar of gasoline on the premises; that they meant someth than a mere casual taking of gasoline on the premis moving it soon after; and that the burden of proof w defendant to show by the preponderance of the evide the plaintiff exposed the property to the additional habitually keeping gasoline on the premises for a co time," before they could find the condition violated, erroneous as applied to the facts.

4. Although there was some evidence from which the ju have inferred that the fire was caused by an explosio line vapor, yet, there being no other evidence of gaso brought to or removed from the premises, such in were thereby not rendered misleading.

5. Where error is assigned upon the charge of the court, if charge is not made a part of the record the bill of e should affirmatively show that it does include the who on the subject matter covered by the exception.

6. Property was insured in several companies, and after a was a dispute as to whether or not the loss was total. sured finally agreed to allow a certain amount as sal vided the insurance companies would pay in cash, whic of them did, and proofs of loss were made and forwar the companies on that basis. In an action against panies which did not settle, the complaint claimed da the basis of such proofs, but the uncontradicted evi the trial showed a total loss, and the jury rendered accordingly. *Held* that, in the absence of any showing fendants were misled or placed at any disadvantag averments of the complaint, it was within the sound d of the court to allow the same to be amended to confor proof.

7. Where insured property destroyed by fire was nearly all by the assured from one company which was claime insurance companies to be the real owner, statements such company to a bank prior to the fire as to the a its accounts receivable, offered in evidence to prove s ership, were properly excluded, especially where su ments were not itemized and there was no proof that not include, and it was possible they did include, the which the assured admitted that they owed such comp. no other testimony as to ownership was offered in co therewith.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought to recover for fire loss under policies of insurance issued by the defendant companies to the plaintiffs. In the answers interposed liability was denied on various grounds. So far as it is necessary to consider these defenses on this appeal they were: (1) Plaintiffs were guilty of fraud and false swearing in making their proofs of loss, in that they represented the value of the property insured to be $6,400, when in fact it did not exceed $600. (2) They represented themselves to be the owners of the property and that it was not incumbered, when in fact they did not own it. (3) Plaintiffs violated a provision contained in each of the policies by keeping and storing gasoline on the premises, and thereby forfeited their right to recover. (4) Fraudulent representations were made in the applications for insurance, both as to the ownership and the value of the insured property. There was a verdict and judgment for the plaintiffs, and from this judgment defendants appeal.

For the appellants there was a brief by *Phillips & Hicks,* attorneys, and *N. P. Christensen,* of counsel, and oral argument by *M. C. Phillips.*

For the respondents there was a brief by *Churchill, Bennett & Churchill,* attorneys, and *Bouck & Hilton,* of counsel, and oral argument by *W. H. Churchill.*

BARNES, J. The evidence was ample to sustain the finding of the jury that the plaintiffs were the owners of the goods destroyed and damaged by the fire, and also the finding that the value of the insured property at the time of the fire was $6,729.47. No discussion of the evidence bearing on these points will be indulged in.

By its answer to question 6 of the special verdict the jury found that the plaintiffs did not permit gasoline to be "kept or allowed" on the premises. Each policy provided that it

should be void if gasoline were kept, allowed, or us
premises without the consent of the insurer being
thereon, and no such consent was given. The test
reference to gasoline was to the effect that a week c
fore the fire the plaintiff *Clute* ordered five gallon:
line, not intended for use in the factory or to be kep
without directing where it should be sent, and that i
livered at the factory while *Mr. Clute* was out; th
turned very shortly thereafter and found the gas
instructed one of the employees to set it outside ar
remained outside until *Clute* was going home to sup
he took it with him. The evidence tended to show
gasoline was kept in the factory but a very few mi
that it did not remain outside to exceed an hour befc
taken away. There was testimony also offered on th
show that the fire resulted from an explosion, the de
claiming that the explosion was caused by gasoline
plaintiffs claiming that it was caused by the accumul
ignition of coal gas in a coal stove. The appellant
that the court erred in submitting question 6 to the
also in charging the jury in reference thereto. A
counsel requested the submission of this question a
no position to assert error because their request was
with. The court instructed the jury that the words
allowed," as used in the policies of insurance, did n
to the temporary presence on the premises of gasoline
thermore, that the prohibition meant something mo
mere casual taking of gasoline on the premises and
it soon after. Also that the burden of proof was
defendants to show by a fair preponderance of the
"that the plaintiff exposed the property insured to
tional hazard of habitually keeping gasoline upon t
ises for a considerable time," before the jury would
ranted in returning an affirmative answer to questio
there is any vice in the charge of the court it is fou

foregoing excerpts, although they embody but a small portion of the charge to which exception is taken. That the instructions given were correct in the abstract is very generally held. *Mears v. Humboldt Ins. Co.* 92 Pa. St. 15; *Smith v. German Ins. Co.* 107 Mich. 270, 65 N. W. 236; *Hynds v. Schenectady Co. Mut. Ins. Co.* 11 N. Y. 554; *Williams v. Firemen's Fund Ins. Co.* 54 N. Y. 569; *First Cong. Church v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 478, 479, 33 N. E. 572; *Williams v. New England Mut. F. Ins. Co.* 31 Me. 219; *Maryland F. Ins. Co. v. Whiteford,* 31 Md. 219; *Springfield F. & M. Ins. Co. v. Wade,* 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714; *Phœnix Ins. Co. v. Flemming,* 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789; *Szymkus v. Eureka F. & M. Ins. Co.* 114 Ill. App. 401; *Thompson v. Equity F. Ins. Co.* 17 Ont. L. Rep. 214. Many additional cases will be found cited in the notes to the last case as reported in 13 Am. & Eng. Ann. Cases, 532. The instructions as applied to the facts in the case before us were not erroneous. They were evidently framed to meet the testimony offered as to the circumstances under which gasoline was brought to the premises in the first instance and as to the length of time it remained, and we think were so understood by the jury. The court might well have instructed the jury that if this testimony were found to be true the provision of the policy was not violated.

There was some evidence offered in behalf of the defendants from which the jury might have inferred that the fire was caused by an explosion of gasoline vapor, and it is argued that the jury might have interpreted the instructions given as meaning that there was no violation of the policies even though the gasoline was permitted to remain on the premises from the time it was delivered until the fire occurred. We are not called upon to decide whether the instructions would be erroneous if they were as broad as counsel claim they were. As before stated, we think the instructions would be understood by the jury as applying to *Clute's* testimony and to that

of the witnesses who corroborated him. There wa evidence to the effect that gasoline had been taker moved from the premises. If it be assumed that sion was caused by gasoline, there is no evidence to s the gasoline was brought on the premises or how l mained there. We are entirely unable to agree w lants' contention that it is a verity in the case th: was caused by an explosion of gasoline. As we rea dence it preponderates the other way.

Only those portions of the charge that are excep preserved in the bill of exceptions, and it is argu spondent that under *James v. State,* 124 Wis. 130, N. W. 320, and *Grabowski v. State,* 126 Wis. 447, N. W. 805, this court cannot review any part of tl because the whole is not incorporated in the bill of e: The cases do not go to the extent claimed. It may c pen that, while a charge is lengthy, exception is take one or two legal propositions therein contained and i unnecessary to incorporate the entire charge in the b this court is entitled to know whether anything is i where in a charge which may cure an erroneous st and is entitled to have all of the charge before it th mane to the part excepted to and which might tend t or explain it; and where the whole charge is not made the record the bill of exceptions should affirmatively s it does include the whole charge on the subject ma ered by the exception.

Three other insurance companies also carried insu the property damaged and destroyed, to the amount o in the aggregate. A Mr. Casper represented these co in the adjustment of the loss. A Mr. Haessly rep the defendant mutual insurance companies. The val insured property seems to have been agreed upon bet parties, or at least some of them, but there was some c ment as to whether there was any salvage on the prope

if so, how much. The amount of salvage was finally agreed upon as being $976.25. Mr. Haessly testified that the plaintiffs figured that they ought to have a total loss; that they finally agreed that they would accept these figures, provided the insurance companies would pay in cash, but they wanted a total loss. Proofs of loss were made on the basis of the adjustment and sent to all the companies. What disposition of the loss was made by the three stock companies does not appear, and it is immaterial, as they are not defendants in this action. In the complaint in the action, damages were claimed on the basis of the proofs of loss which were furnished to the defendants. On the trial evidence was introduced, apparently without objection, to show that the loss was total, and such evidence was practically uncontradicted. The jury found that the loss was total and assessed the plaintiffs' damages accordingly. After verdict was returned the plaintiffs moved to amend their complaint so as to conform to the proofs, and such amendment was allowed. The ruling of the court in this regard is assigned as error. There was no showing made by the defendants, in opposition to the motion, to the effect that they relied on the statements contained in the proofs of loss or on the allegations contained in the complaint in reference to the damage which the plaintiffs sustained and that because of such reliance they were unprepared to offer and did not offer any testimony in reference to the amount of the salvage. In fact they claimed that the entire stock insured was worth only a few hundred dollars. In the absence of any showing that the defendants were misled or placed at any disadvantage by reason of the averments of the complaint in reference to the amount of damage sustained, it was within the sound discretion of the trial court to permit the amendment. *Williams v. Arnold,* 139 Wis. 177, 180, 120 N. W. 824; *Bieri v. Fonger,* 139 Wis. 150, 154, 120 N. W. 862, and cases cited.

It is further urged that the insured stock of goods belonged

to the Wiens Brush Company and that the plaintiffs we: the sole and unconditional owners of the property and i: had no insurable interest therein, and that therefore ı covery could be had upon the policies of insurance. W unable to find any evidence which supports this conte: There may be some facts established which tend to cr suspicion as to the ownership, but this is the extent to the evidence goes. The stock of goods in question was a entirely purchased from the Wiens Brush Company b plaintiffs, and the defendants offered a statement made b Wiens Brush Company to the bank with which it was business, under date of January 2, 1908, which stat showed the aggregate amount of accounts receivable a time. They also offered another statement made to the bank showing the aggregate amount of accounts recei which such company claimed to own on December 31, Both of these exhibits were rejected and error is assign cause they were not received in evidence. The stateme January 2, 1908, showed the amount of accounts receiva be $4,670.82. The statement of December 31, 1908, sh the amount of such accounts to be $5,187.21. The sale plaintiffs was made during the year 1908 and was largely on credit. The amount due to the Wiens Brush pany on December 31, 1908, on account of this sale, w proximately $3,613.88. No error was committed in e ing the exhibits, if for no other reason than because the not tend to prove anything. The accounts receivable not itemized. The statement of December 31st might have included the account against the plaintiffs. Cert in the absence of any testimony showing that it was n cluded, no inference could be drawn to the effect that i omitted. The statement might have been competent evi in connection with other testimony in reference to owne but no other testimony was offered. There being nothi the statements that tended to contradict or put in issue t

rect and positive testimony of the plaintiffs that they were the owners of the stock of goods, the statements were wholly immaterial.

Some other errors are assigned. They have been examined and found to be without merit and we deem it unnecessary to discuss them in detail.

By the Court.—Judgment affirmed.

WOJAHN, Appellant, vs. NATIONAL UNION BANK OF OSHKOSH, Respondent.

January 11—January 31, 1911.

Reference: When proper: Presumption on appeal: Findings of referee, when to be affirmed: Evidence: Preponderance: Contracts: Implied promise to pay for services: Banks and banking.

1. Where the record does not show what proofs were produced in support of a motion to refer, it will be presumed on appeal that a case was made warranting the order of reference, if the character of the action was such that it might be referred under any circumstances.
2. Findings of a referee appointed to hear, try, and determine a case should not, when reviewed by the circuit court, be treated from an original standpoint, but should have the same force and significance that findings of a trial court have upon review in this court. They should be affirmed unless contrary to the clear preponderance of the evidence, due weight being given to the superior advantages which the referee has for discovering the truth. This means that, ordinarily, such findings should not be disturbed unless manifestly so contrary to the evidence as to be really unexplainable except upon the theory that wrong rules of law were applied or material evidence wholly overlooked or a perverted view taken of the case.
3. The preponderance of evidence is not to be determined by merely taking account of the number of persons testifying on each side.
4. If a person performs valuable services for another at that other's request, the law implies, as a matter of fact, the making of a promise by the latter and its acceptance by the former to pay the one performing the services the reasonable value thereof.

within a short distance of Oshkosh, the home of the defendant. The business at Split Rock was important to the community and especially to any bank located at Tigerton, and that place, in a financial way, was tributary to Oshkosh. To promote defendant's business the officers and stockholders thereof caused a bank to be established at Tigerton under the name of the First National Bank of that place. Such stockholders and officers took a controlling interest. Defendant's president became president of the new bank and R. H. Hackett, cashier of the former, became vice-president of the latter. Through Mr. Hackett plaintiff was given the office of cashier of the Tigerton bank and was enabled to become a stockholder therein. Immediately after organization thereof C. L. Brownell & Co. commenced doing its banking business therewith. After about two years the firm was succeeded by a corporation under the name of the C. L. Brownell Company. After the corporation continued the business for about three years some changes in stockholders and officers occurred, new capital was taken in, and the name was changed to M. A. Sorley Company under which it was continued during the balance of the time material to this case. The business conducted by the company, from first to last, was important to the Tigerton bank. All the company's banking business was done there and some of its stockholders were stockholders of the bank. The company became a debtor of the bank to the extent the institution could well loan money to one borrower, and so far as the company otherwise needed credit it was mainly accommodated through defendant, which was under the active management of Mr. Hackett. The relations between the two banks were such that they were mutually interested in the affairs of the Brownell Company, that of the Tigerton bank being in some respects the greater and that of defendant being for some reasons the greater. In 1901 the company procured from defendant a loan of $15,000. Application therefor to plaintiff at the Tigerton bank was referred

At this time and
o this case, the com-
ere quite closely af-
nancial matters the
y to the defendant
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btedness. The en-
notes being turned
quite independently
with a view of pro-
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ters appertaining to
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etain all the paper.
time obtained upon

sisted of real and
ll assets of the com-
ompany quite inca-
utside the circle con-
eir pleasure. Such
his successor in the
xcept as realized on,
little time after all
nd plaintiff became
affairs of the com-
unless its business
ight be forced into

bankruptcy, in which event defendant might probably lose a large amount as it held the greater part of the two loans mentioned. To guard against that danger and because of the connection of defendant with the entire Brownell indebtedness, secured by the securities running to Hackett, he, acting for defendant, conceived the idea of having a representative of the holders of such indebtedness, particularly of defendant, supervise the company's affairs. The idea was carried out, plaintiff, at Hackett's request, undertaking the task. For a considerable length of time, in doing such work, he visited Split Rock several times a week after banking hours. In time the work required was less but he continued in some capacity and to some extent as supervisor of the company's affairs till the entire indebtedness was paid. He early concluded that he could not efficiently perform his work without being a stockholder and officer of the company and so advised Mr. Hackett. It was thereupon agreed that he should procure a controlling interest in the stock and that Hackett, as cashier of the bank, should aid by loaning the necessary money. Pursuant thereto the stock was purchased, half being placed in the name of plaintiff and half in the name of Mrs. Brownell, and $1,250 being loaned to each to pay for the property at the rate of twenty cents on the dollar. The stock was put into a voting trust composed of three persons, two being Hackett and the plaintiff, and it was agreed that a majority of the trustees might vote the entire trust stock and so control the policy of the company.

After taking the stock plaintiff was made an officer of the company and allowed by it a salary of $200 per year for a time and after that of $150 per year for a few months. He received in all $367.47 for services rendered the company. For the purpose of giving the company credit standing Mr. Hackett released his chattel mortgage on its assets under an agreement that it might be reinstated at any time upon a vote in favor thereof of a majority of the voting trustees.

From first to last plaintiff did not render any bill to defenc for services, nor did he make any specific claim or substan demand till this action was commenced. He received f defendant $125. The circumstances in relation thereto v disputed. He claimed that about 1905 there was some about his being furnished a horse or a horse and buggy to able him to more conveniently and efficiently perform his w of looking after the company's affairs, and that he finally formed defendant he would take $125 instead of being furnished, and it was accordingly paid him. On behalf of fendant there was testimony of there having been talk abou horse and buggy, but that $125 was, in the end, paid in set ment of any claim plaintiff had against defendant. Plain continued to supervise the company's affairs after he recei the $125, exercising controlling authority in that regard, some capacity, till the last of the indebtedness to defend was paid, which occurred in 1908.

Till Mr. Hackett severed his connection with defendant 1905, he and plaintiff worked together in regard to the cc pany's affairs, to the end that the indebtedness, particula the large amount due defendant, might finally be pa Plaintiff, as stated, continued till full payment was secur At last he negotiated a loan for the company, becoming surety himself, by which the last of the indebtedness was pa He did not buy the stock with much, if any, expectation profiting thereby. The thought was rather that there mig be a loss, so Mr. Hackett encouraged him to take the ri thereof with such chance as there might be for profit by bir ing himself to stand one half the loss, in case of there bei any. After efficiently promoting the company's business f some time and to such extent that the danger of loss to cre itors was largely reduced, plaintiff sold his stock but short afterward, in order to further promote the purpose of his s pervision, he repurchased the same. A few months later again sold, leaving the company at that time in a fairly sa

condition. He did not make any gain out of the ownership of stock. If anything there was a loss of a small amount. His administration was taken, as stated, at the request of Mr. Hackett, acting for defendant, and was continued to the end with the knowledge of its officers. For the first two years or more the work of supervision required almost daily attention. Thereafter the labor was less. His services were quite valuable, especially to defendant. Such special value the evidence tends to prove was around $300 per year on the average. As to whether he was promised compensation therefor the evidence was in sharp conflict. He testified that he was so promised by Mr. Hackett and by each of two other officers of the bank. His testimony as to each of such persons was contradicted. Hackett, while testifying to having officially requested plaintiff to render the services and that they were valuable to defendant, said he did not at any time promise plaintiff compensation or think of the matter of defendant having to compensate him or of his having expectation of receiving compensation other than such as he might receive from the company or by way of benefits on account of his connection with the Tigerton bank.

The referee found, as regards vital matters, these as facts:

1. During the year 1901 defendant loaned $25,000 to the C. L. Brownell Company;

2. In 1901 and 1902 it seemed to the cashier of defendant that the company's business was being poorly managed and that its affairs were in such condition as to menace defendant with serious danger of sustaining a large loss by reason of having extended credit as stated;

3. In 1902, plaintiff, by request of Hackett as cashier of defendant and with the knowledge and approval of its officers and directors, performed services for it in respect to the aforesaid indebtedness, counseling as to its management under the advice of Hackett, assisting in collecting the company's credits and conserving its assets, visiting its office several times a

week after business hours, spending portions of
and evenings there, making numerous trips to Oshk
sult with defendant's officers and, generally, in s
the company's financial affairs;

4. In aid of rendering the aforesaid efforts effici
tect defendant's interest, plaintiff, at the request ar
the assistance of Hackett as cashier of defendant,
stockholder and officer of the company, and, as sucl
from it $20 a month for about two years. He als
during the period of his service $125 from defend
to apply on services or expenses, or both;

5. The loans of defendant to the Brownell Com
all eventually paid with interest;

6. Plaintiff's services in securing such payment
dered by request of defendant through its cashier
knowledge of its officers and directors, covered a
five and one-half years, the labor during the first p
period being more burdensome and important than
were worth in the whole to defendant an average of
year or $1,650 in all, on which the $125 paid shoul
ited and judgment rendered in plaintiff's favor fo
ance.

On behalf of respondent various exceptions wer
the referee's findings and a motion made for an ord
aside the report and directing judgment on the
and evidence in its favor. The court disposed of t
by an opinion of about eleven pages in the printed
which the following appears as the true state of the

There are only two disputed questions of fact. C
does the referee make any findings. One is as to
Hackett promised plaintiff pay for his services
Brownell Company. As to that the evidence of the
direct conflict. The other is as to whether Rideou
wards, two other active officers of defendant, promis
iff pay for his services. On that he testified in th

tive and they contradicted him. Therefore, as the burden of proof was on the plaintiff, on the first controversy he failed to present a preponderance of the evidence, and on the second the preponderance was in favor of defendant. Hence no express promise was established, and if there was any contract "it must be one implied from undisputed evidence."

From the circumstances (a) that plaintiff's bank was closely affiliated with defendant, each institution working, in general, to promote the interests of the other; (b) that plaintiff was under strong personal obligations to Hackett and had expectation of advancement as a reward for faithful service for the general interests; (c) that the arrangement to look after the Brownell & Co. business was made with Hackett personally to conserve his interests, as the person to whom the large indebtedness was, in fact, incurred, as well as to conserve the interests of the Tigerton bank; (d) that he became a stockholder with Brownell & Co. at the request of, and by the personal assistance of Hackett and under a written contract with him; (e) that when the services were performed plaintiff was a stockholder of the company, one of its officers, and was paid a salary by it; (f) that he made no claim against defendant till the expiration of some five years and a half; (g) that at no time was he expressly promised compensation by any one on behalf of defendant; (h) that he never in fact collected the indebtedness to defendant and his services were valuable to his own bank, and specially valuable to Hackett; and (i) that at times his conduct was adverse to defendant,—the presumption must be that his services were, in general, for the Brownell Company and, so far as defendant was concerned, gratuitous.

The opinion, so called, closed with these words: "The findings of the referee must, therefore, be set aside so far as they conflict with this opinion; more specifically the fifth finding of fact [as to whether the services were performed at the request of Hackett as cashier of defendant] and the conclusion

of law; and such further findings may be drawn as are c
proper in accordance herewith. Judgment is ordered
fendant dismissing the complaint on the merits with co

Agreeable to the suggestion as to other findings, c
for defendant prepared for the court an instrument o
teen pages in the printed record, denominated "order, fi
of fact, and conclusions of law," under eighteen head
facts and four heads as to conclusions of law, coverin
historical and argumentative way, the whole case, and,
main, along lines suggested in the court's opinion, but e
sizing the court's opinion ideas and adding several m
suggestions of fact, significant among them being, that
iff purchased the stock in the Brownell Company for
lative purposes and profited thereby.

The instrument so prepared was filed as the final de
nation of the court, and in accordance therewith judgme
rendered in defendant's favor.

For the appellant there was a brief by *Goodrick &*
rick, and oral argument by *E. J. Goodrick.*

For the respondent there was a brief by *Barbers &*
linger, and oral argument by *Charles Barber.*

MARSHALL, J. The record does not disclose the proo
duced in favor of the reference. The order recites t
was satisfactory to the court. Counsel for appellant s
have shown by the bill of exceptions precisely upon wh
decision was made. They failed to do so. In face the
must be presumed a case was made on the motion warra
the conclusion reached. It cannot be assumed the orde
made on the pleadings alone. The character of the cau
shown by the complaint, does not indicate that the caus
not referable under any circumstances. Error in rega
the reference not having been made to affirmatively appe
bringing to our attention with certainty the exact natu
the case as made to appear on the application to refer, th

sumption must be in favor of respondent regardless of the case made on the trial.

A few observations respecting the practice followed subsequent to the filing of the referee's report will not be out of place. They will suggest, in a measure, why the decision of the trial court does not possess quite the force which it might have had.

Upon a referee's report being filed, and counsel thinking the findings of fact, or some of them, to be contrary to the evidence, exceptions may be filed and relief demanded by motion to correct the findings and for judgment accordingly. Sec. 2865, Stats. (1898). That course was not strictly followed here, though in the opinion of the court it was substantially. Counsel for respondent moved on exceptions for vacation of the report and for judgment on the exceptions and the evidence. It is thought by the court that the trial judge regarded the motion as one to correct the findings of fact and conclusions of law and for judgment thereon as corrected. The motion was disposed of by a decision and opinion of considerable length covering all phases of the case, concluding, as indicated in the statement, by a determination that all findings conflicting therewith "must be set aside," etc., and the suggestion that "such findings may be drawn as are deemed proper in accordance herewith," followed by an order for judgment in favor of defendant dismissing the complaint on the merits with costs. The judge, in my personal view, but not that of the court, left it optional with counsel for respondent to enter judgment without any formal findings, or to have findings in their own language, consistent with the opinion, placed on file. The court, notwithstanding the closing language of the decision, is of the opinion that the judge expected such formal findings approved by him would be filed as a final basis for judgment; but, obviously, it was supposed such findings as might be filed would be in the language of counsel. That fact alone is not subject to criticism. That

agree. However, the findings signed nclusions of the is- ewhat of an argu- ns, having rather a th of the very full and mentioning all dent in very favor- mentioned by the ides. There is no counsel or circuit f the advocate was ered every point in pictured in a some- h cast is indicated stockholder in the making a profit on are unable to find on decidedly to that ther way, as will be

seems the real judi- is found most cer- fore, in treating the point, paying care-

will observe, at the d to hear, try, and does not fall much, In review by the taken with such a ettled practice, can made by a circuit d that general rule. uage of a rule and

quite another to appreciate the force of it according to settled practice. In this respect it seems the trial court's determination bears some evidence of infirmity.

When it is said that the findings of a referee should be affirmed by the circuit court unless they are against the clear preponderance of the evidence, as in *Leasia v. Penokee L. Co.* 103 Wis. 304, 79 N. W. 224, and many similar cases, the same degree of certainty respecting the rightfulness of the referee's decision is intended as in case of findings made by a court when the same language is used in respect thereto. *Ott v. Boring,* 139 Wis. 403, 121 N. W. 126. The rule contemplates a strong presumption in favor of the findings; one that cannot be displaced unless the evidence against them is so clearly that way that failure to decide according to the preponderance appearing from the printed or written record, cannot reasonably be accounted for by the helps which the trial officer may have had that could not be made a matter of record for the benefit of a reviewing court, particularly the appearance of witnesses and their manner while giving their evidence. These unrecordable helps in discovering the truth, may, reasonably, be so significant that, when findings rest upon conflicting evidence from the mouths of witnesses, they cannot be much more easily disturbed by a reviewing court than the verdict of a jury. In any event, reasonable doubts, under all the circumstances, as to whether the evidence preponderates against the findings, are to be resolved in favor of the negative. The statute says that the report of a referee shall have the effect of a special verdict. Sec. 2865, Stats. (1898). It is not improbable that the Code makers intended that they should stand upon the same plane, as doubtless it was that they should, in substance and conciseness, be substantially the same, as such special verdict. In the beginning it was said that such finding could only be disturbed in such circumstances as would warrant setting aside the verdict of a jury. Later the rule we now have was adopted, largely, as a

history thereof shows, with reference to decisions in oth risdictions having no Code provision like our sec. 2865.

The real significance of the term "clear preponderan the evidence," unless from time to time specially recur in opinions of this court, it seems is liable to be lost sig as there are quite persuasive indications that it was here.

In *Ott v. Boring, supra,* the matter was considered a siderable length. There the trial court, as here, rad changed the findings of the referee. That was unexplai from the record, except upon the theory that the true me of "clear preponderance of the evidence" was not apprec After a full review this court felt bound to reinstate the ings and order judgment accordingly. It was there sai all reasonable doubts are to be resolved in favor of such ings; that

"there are many things which cannot be spread upo printed record, but may properly be considered by a trial and are of great, and often controlling, significance in mining the truth as between conflicts from the mouths o nesses. As experience shows, and from the nature of th justice is much more likely to be done by leaning p strongly upon the initial determination than by endeav to treat a disputed matter from an original standpoint."

The rule as to clear preponderance of the evidence quires the overbalancing weight to be "so apparent as to r festly outweigh any probable legitimate influence upo triers of those advantages for discovering the truth whic reviewing tribunal cannot have." It was suggested in *nasha W. W. Co. v. Michelstetter,* 126 Wis. 427, 105 N 927, that it must appear, looking at the printed record a that the evidence in support of the findings is overwhelmi overcome to warrant disturbing them. That was empha and enlarged upon in *Rankl v. Schmidt,* 133 Wis. 103, 113 N. W. 423. In *Endress v. Shove,* 110 Wis. 141, 8 W. 651, it was said that such rule is unbending and admi no exception.

Thus it will be seen firmly entrenched in our jurisprudence, that there is little room for disturbing the report of a referee or the finding of a trial court unless the same are manifestly so contrary to the evidence as to be really unexplainable except upon the theory of wrong rules of law having been applied, or material evidence having been wholly overlooked, or a perverted view having been taken of the case. So a situation, as experience shows, seldom is presented where either the conclusions of a referee or trial court, on mere matters of fact, are disturbable. Further, that the most common mistake in changing reports of referees comes from either not appreciating the significance of the term "clear preponderance of evidence" or that it applies to a referee's report when under consideration by a trial court the same as the findings of the latter when under review by this court.

Here there are quite plain indications that the trial court while starting out by recognizing the language of the rule we have discussed straightway entered upon doing what was done and condemned in *Ott v. Boring, supra,* viz.: treating the "disputed matter from an original standpoint," as we shall now see.

The court opened the review of the case, as indicated in the statement, by observing that "there are only two disputed questions of fact on neither of which does the referee make findings." Then reference was made to the conflict between Hackett and plaintiff as to whether the former expressly promised the latter compensation for his services and the conflict between Rideout and plaintiff as to whether the former as an official of respondent, on one occasion promised the latter compensation, and Edwards, also one of such officers, at one time made a like promise,—as the two disputed questions, and then it was observed that, since in the first instance Hackett and plaintiff were in direct conflict, there was, obviously, no preponderance of evidence in favor of the latter, and that in the other instances there was the same situation as to Edwards, creating a preponderance of evidence against plaintiff.

Keeping in mind that the recovery was not sought o press contract, and that nothing appears in the complaint gesting any such contract, it will be seen that the court conceived the situation in referring to the mere eviden conflicts outside the cause of action disclosed in the ple as involving facts in issue which the referee neglected to upon, and furthermore, by speaking of all other facts as r dispute. There was no necessity of passing upon the two ticular matters in the findings; none whatever. The court not only mistakenly dignified the mere conflicts they were vital facts in issue, but misapplied the law th Certainly the learned trial judge, by mere oversight r than want of knowledge on the subject, held that, necess there was no preponderance of evidence in appellant's in the one case because he was contradicted by one wit and that there was a preponderance of evidence against because as to one occasion he was contradicted by Rideou another by Edwards. It is a common thing for a finding court or jury to be made in favor of the party on whor burden of proof rests on his uncorroborated evidence a clearly contradicted by the adverse party. A matter in on conflicting evidence is not to be settled by merely t account of the number of persons testifying adversely. may testify as positively as the other, yet the evidence o reasonably appear clearly true and the evidence of the even wilfully false. We shall not take time to discus credibility of the evidence referred to, but will remark while there are circumstances that might be so viewed fatally discredit the evidence of appellant there are others which tend to corroborate him and discredit the dence of Hackett, Rideout, and Edwards, so that had the of action been on express contract and a finding been ma appellant's favor as to the conflicts referred to, it is dif to see how the result could be disturbed as against the preponderance of the evidence.

The suggestion of the trial court as to the findings o

referee not covering the case, does not seem to be warranted. The findings might well have been somewhat more in detail, but they have the merit of conciseness, also of brevity, also of being pretty free from mere evidentiary matter and wholly free from mere argumentation. They are, in the main, framed in the language of decision as such findings should be. In language making about three pages of the printed record, they state, in a fair way, the ultimate facts upon which the legal conclusion reached by the referee was based.

The theory of the complaint is that appellant, at the request of Hackett, respondent's cashier, who was competent to bind it by contract, performed for it services in protecting it from loss by reason of having become a creditor of the Brownell Company to an excessive amount; that he complied with such request, rendering valuable services covering a period of over five and one-half years, and that, thereby, respondent became liable to pay him the reasonable value thereof as upon implied contract.

There can be no fair question but what all the facts necessary to such an implied contract were covered by the referee's finding with some particularity regarding the nature of the services and the circumstances of their rendition. It was wholly unnecessary to find, in words, that the parties made a contract by implication. The finding of all the minor facts necessary to the major one as a legal inference, the nature and amount of the services rendered, the reasonable value thereof, and the amount received thereon, was all-sufficient. To have added, as a conclusion of fact, that the parties made an implied contract that the services of appellant should be for hire was entirely unnecessary, though it would not have been an impropriety. There was a necessary implication of fact, as matter of law, from the minor facts found, so fully covered in the general conclusion that appellant was entitled to judgment for the amount found to be the reasonable value of the services less the amount found to have been paid thereon.

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[illegible] ived the court pro- [illegible] an original decision [illegible] ce to the considera- [illegible] aw, that there being [illegible] l be no recovery ex- [illegible] ies from the undis- [illegible]

[illegible] not clear as to what [illegible] e quoted language. [illegible] l argument, to share [illegible] clear up the ambigu- [illegible] They confessed, as [illegible] dge's language liter- [illegible] At the best we can [illegible] itself, creates doubt [illegible] of the law and evi- [illegible] the findings of the [illegible]

[illegible] ed contract entitling [illegible] arily, depend on "the [illegible] could not well have [illegible] the true state of the [illegible] st, is plain, as there [illegible] witnesses and very [illegible] es, as the discussion [illegible] and the much more [illegible] alled, which counsel

prepared, shows. Some important evidentiary matters were worked out, largely from conflicting inferences. The question of whether there was an implied contract, was not, necessarily, solvable from the undisputed evidence but from the preponderating evidentiary inferences from facts established directly and circumstantially, there being conflicting inferences even as to many of the minor facts.

Did the respondent, through its cashier, request appellant to perform the service for which compensation was claimed? That was found, as before stated, in his favor by the referee. He testified that such request was made by Hackett in his capacity as cashier. Hackett so testified, very clearly, as we understand his evidence. He carried the idea, it is true, that he did not promise appellant compensation and did not think of his getting any from the bank, but the whole trend of his evidence, from first to last, is that his dealings in respect to the matter with appellant were in his official capacity and to save respondent from danger of serious loss which, at one time, he thought might run up to many thousands of dollars in case of the Brownell Company not being so supervised and advised respecting its affairs as to save it from apparently impending bankruptcy. Moreover, Hackett's evidence tends to prove there was talk between himself and appellant with respect to compensation. He said he told plaintiff he had no authority to promise compensation. But that was a confession that compensation was talked about. The subject was so far in the minds of both that the very suggestion that he had no authority to expressly promise remuneration was rather pregnant with the idea that appellant would have to rely upon the implication which would arise from the circumstance than the idea that whatever he did would have to be regarded as done gratuitously.

True, the notes held by respondent were taken in the name of Hackett and the securities ran to him, circumstances to which the court seems to have given controlling effect in com-

ing to the conclusion that the whole affair was a personal one of Hackett's. But, as we read the evidence, it is undisputed that the two loans, the first of $15,000 and the second of $10,000, were made by the bank, Hackett using his name as a mere convenience. The bank advanced all the money. All the notes passed through it. All seem to have been kept by it, except a part to prevent an appearance of excessive loans having been made. One familiar with the way such business is done can easily see that Hackett had no mere personal connection with the matter. The evidence indicates he made the loans as a bank matter, and all the operations so far as the loans were concerned, in which he used appellant very efficiently, were to save the bank from any loss, direct or indirect. Not only is the finding of the referee that the loans were bank loans and appellant assisted in making them good at Hackett's request, acting officially, not against the clear preponderance of the evidence, but are very strongly supported thereby. There are very many circumstances on this corroborating the direct evidence of Hackett and appellant, but we shall forego referring thereto in detail. Taking the case as a whole, there was no warrant which we can see, in disturbing the finding of the referee as to substantially all appellant's services as regards the two loans aggregating $25,000 having been for respondent rather than for Hackett personally.

That the services rendered by appellant, extending as the referee found and upon evidence well supporting it, over some five years and a half, were very valuable to respondent, seems to be supported by substantially all the evidence. The evidence belittling the service, given by some witnesses on the part of respondent, though very persuasive, apparently, with the trial court, seems to have, as in our judgment it well might, almost fatally discredited their testimony with the referee. Hackett, who was evidently the master spirit in respondent's behalf for some three years after the service com-

menced, during which the most burdensome part was performed, and the only one who really knew enough about the situation during that period, to be able to appreciate the nature, extent, and value of the service, had no hesitancy in agreeing, substantially, with appellant, except as to his having made an express promise on behalf of the bank, or had in mind the idea that appellant would be entitled to pay. He put the value of the services of appellant in managing the Brownell business at some $40 per month in excess of the amount paid at any time by the company, and it must be remembered that for a large part of the time there was no compensation from that source. He placed the value as to respondent quite as high, if not higher than the referee. His evidence shows that respondent's officers, other than himself, did not know, except in a general way, about the services, and the evidence of such officers corroborates that. So to the extent that the referee found appellant's services were quite valuable to respondent, especially from some time in 1902 to about the close of 1905, there is no clear preponderance of evidence against it, or really any very credible evidence.

From the foregoing we have these verities: (a) Appellant was requested on behalf of respondent to perform for it services; (b) he complied with such request continuing his labor till the task assigned to him was ended; (c) his services were very valuable to the respondent. From such circumstances there arises, as matter of law, a presumption of fact that the services were performed under contractual relations. It is a mistake, in the technical sense, to speak of the contract as one implied by law. There are such contracts. They arise where there is a legal duty to respond in money which by a legal fiction may be enforced as upon an implied promise. In such case there is no element of contract strictly so called. There is only the duty to which the law fixes a legal obligation of performance as in case of a promise *inter partes*. So it is called in the books a *quasi*-contract. There are implied con-

At this point we have a significant infirmity in the court's logic. The case in hand was likened to one where there has been no request for the performance of the service; only an acceptance, complicated with such circumstances as to prevent the inference of fact in favor of compensation arising. *Ames v. Lamont,* 107 Wis. 531, 534, 83 N. W. 780.

Having, without warrant it seems, overturned the finding of the referee as to the services having been performed upon request, the court failed to reach a point where the burden was cast on respondent to rebut the strong *prima facie* case. With that error to start with, the road to the result reached was not so difficult to logically travel as it otherwise might have been.

Did the referee decide against the clear preponderance of the evidence in holding that the respondent failed to efficiently rebut the presumption of fact in appellant's favor arising from the verities heretofore mentioned, which were, as we have seen, too strongly entrenched in the evidence to admit of their being properly disturbed on the review?

In view of what has been said it would seem that the question last suggested might well be answered without any discussion. If the errors already referred to had not been committed, doubtless such question would have been answered by the trial judge in favor of appellant. We will refer to the more significant circumstances upon which the conclusion was reached.

As we have seen, the findings by the referee efficiently condemn many of the conclusions as to the existence of circumstances indicating that it was supposed by the parties, the services were gratuitously performed. Two were of much significance, viz.: (a) the services were performed by request of defendant, through its managing officers, and not for Hackett personally; (b) such services were very valuable to respondent.

One other matter referred to by the court is that the services were substantially as valuable to appellant's bank as to

respondent. If that were so the fact would still remain that appellant was not under obligation to serve respondent, while he was his own bank, but the fact is that his work was of vastly more importance to respondent than to any other party,—even for the Brownell Company. We shall not go into detail on this. Suffice it to say, the interest of respondent in having the work performed, which appellant did, appears so much greater than that of the Tigerton bank as to make the latter appear quite insignificant.

Again the suggestion was in effect made that appellant received full pay from the Brownell Company. But the fact seems to be that he received no pay whatever for the first six months or so and none commensurate with the value of his services for the next two years or thereabouts, and none for some two years and a half thereafter; while, according to the testimony of the witness who seemingly was the best judge from every point of view, his services in the outside work were worth, during the last two years, $50 per month.

Another circumstance referred to is that for most of the time appellant was a stockholder and, as said in the findings but not in the decision and opinion, he bought the stock for and made a profit. If that had any sound basis in the evidence it would be very persuasive though far from conclusive. We are unable to find such basis. As we read the evidence the stock was purchased solely to enable appellant to make his work of supervision in the interest of respondent, successful. It seems that is the effect of appellant's and Hackett's evidence. The former did not put but twenty per cent. of the par value of the stock into the venture. He did not, in reality, furnish any of the money. It was done by the bank through Hackett. He took appellant's note with the stock as collateral, then turned the matter over to the bank where it remained for some two years and a half, appellant paying interest to the amount of $187, when the stock was sold, netting the face of the note, and the money was turned in to take it

up. Thus he was out the $187 and interest thereon, amounting in all by the time the second turn was made to about $210. Again he took the stock and in a few months sold it, the carrying charge being about $35 as near as we can figure from the evidence. The second sale was at an advance over the purchase of $200, thus leaving him a loser to the amount of some $40. He summed up the matter by saying, "I was a little out on the stock," which seems strictly true. When he first took the stock he requested Hackett, evidently as representing the bank, to bind himself to share half the loss, if any occurred, showing that loss rather than profit was thought to be within reasonable probabilities. The amount paid by the Brownell Company could not have much, if any, more than offset his expenses during the five and one-half years. He testified that Hackett created the salary really to take care of the expense incident to the situation filled by him and we do not find that denied, effectively, anywhere.

The further fact is referred to that respondent paid appellant $125 in 1905 as a gratuity, he making no claim for services, and that it was ample to compensate him for all he did specially for respondent. The finding of the referee was that such payment was made to apply on services, or expenses, or both. We are unable to find any warrant for disturbing that finding. The idea that it was a fair equivalent for appellant's services seems to be contrary to the evidence of Hackett and to all the credible evidence. It is based on that of Rideout and Edwards, particularly the latter. The fact that they gave evidence of that character, as heretofore suggested, greatly impaired their credibility. The only excuse we can discover for their giving such testimony is that they knew very little about the real nature of appellant's services, which, as before said, pretty clearly appears to be the fact. We will assume that they testified honestly with the light they had. That is as far as we can go in face of the fact, quite apparent from the record, that appellant's expense up to the time the

$125 was paid must have been quite as much, if not more than that sum.

Again the fact is given much significance that there was such a community of interest between respondent and appellant's bank that it was appellant's moral, if not his legal duty, to serve respondent, as he did, and without pay. The idea that a man of appellant's conceded ability working under a very small salary for a bank, which was, in a legal sense, wholly separate from respondent, and having, to a considerable extent, different stockholders, had any moral or legal duty to work over hours performing services of a reasonable value of more than two thirds all paid him for full time at his bank, especially to do such work for the wealthy aggregation constituting the respondent, seems to be far-fetched. In our judgment the reasonable inference is rather that appellant expected that an institution of the dignity of respondent and a body of men of the evident financial standing of its stockholders would not only be willing to but would insist upon paying him fairly for his services; that he expected pay, and that respondent by its responsible officers, especially the manager, Hackett, expected to render pay, if they thought about the matter at all. Perhaps they did not think about it, but that does not relieve respondent from responsibility.

True, Hackett, who really did all the business with appellant on behalf of respondent for the first two or three years, testified, in effect, that he did not have it specially in mind during the time the services in question were being performed that there would be any expense on account thereof against the bank. However the legal presumption of fact, arising from the request for and performance and value of the services to respondent, is not rebuttable by mere evidence that Hackett or any one else connected with the bank did not think of the subject of compensation. Neither party may have specially thought about the matter and yet the presumption in favor of appellant would stand if the situation was such that, had the

parties turned their attention thereto in view of the law, there would or ought to have been mutuality of thought in respect to the matter.

It is further suggested that appellant made no definite claim for compensation till some five years after his service commenced. That was given great weight in favor of respondent. It might have been given such weight by the referee and may have been. However, it is short of being of sufficient weight to warrant setting aside his finding in view of the fact that the claim for compensation was made quite promptly after the indebtedness of the Brownell Company was paid off. Till that time appellant may have thought he was not in a very good position to determine, himself, how much his services were reasonably worth. The fact that he finally aided in closing the matter up by inducing parties to put a large amount of new capital into the company and, by his personal responsibility, assisting in obtaining money to make the final payment, and that too after he ceased to expect any profit on his stock, if he ever did, which does not seem to be the case, thus putting himself in the breach, finally, to end his task, is hardly explainable upon any other reasonable theory than that he expected in the end, and had reasonable ground to expect, pay for his work by respondent.

The only other suggestion we will mention, given significance by the trial court, as indicating that appellant's services were intended to be gratuitous, or at least that he was in no position to claim compensation therefor, is that on one or two occasions he acted adversely to respondent in reference to its relations with the Brownell Company. To our minds the court drew that conclusion from the evidence without discovering the real ground of respondent's conduct as the referee might well reasonably have viewed it. It appears that for some two or three years prior to the time the court referred to, appellant had been pursuing a policy, determined upon by him and respondent's cashier, which they jointly supposed

would, in due time, rescue it from all danger of loss and at the same time save the Brownell Company from bankruptcy, which was a matter of some interest to the bank. Pursuant to that policy he had worked to induce the putting of new capital into the company, had carefully conserved all its assets, and had aided materially by the operations of the Tigerton bank and to the profit of the proprietors of respondent as stockholders thereof. After the lapse of such time Hackett's connection with respondent and the Tigerton bank was severed. The relations of respondent's officers with him became, evidently, somewhat strained, especially on account of the extension of credit to the Brownell Company. There was dissatisfaction as regards the status of that indebtedness and the slowness with which the prospects of final liquidation had brightened. In that situation such officers thought to change the policy to one of coercion. To that appellant objected, seemingly, because he, under the direction of Hackett, had, as he supposed, committed himself and respondent to a friendly course, thinking that would, in the end, be the best way to bring about the result desired. So he objected, rather strenuously, to the attempted change, but in no spirit of hostility as it seems. Certainly, as appears, he was finally not only permitted, but rather encouraged, probably urged to keep on with the plans theretofore pursued, which he did, resulting in respondent being paid the balance due it June 29, 1908, some $14,000, out of a loan obtained for the company by his efforts, and partly, as before said, upon his responsibility, and thus the long campaign, commenced over five years before, was brought to a successful termination. In that light, which is at least a reasonable view, and so should be taken in support of the referee's finding, the incidents given so much dignity below against appellant do not appear important.

It seems needless to add that though the inferences which the court drew from the evidence were not so wholly without warrant, that had the findings of fact been those complained

of now perhaps they could not have been set aside as against the clear preponderance of the evidence, it is quite clear that had the trial court made, as an original matter, the findings which the referee made, they would easily have stood the judicial test on appeal. It is from that standpoint the case must be viewed.

The question as to whether the reasonable value of the services is against the clear preponderance of the evidence needs no extended treatment in addition to the foregoing. There seems to be no question but what the time, five years and a half, as fixed by the referee, is right; none but what the value of the services in the whole, as fixed by Hackett who evidently knew most about the matter, is moderate. The difficult question for the referee was to determine how much was the reasonable value of the services chargeable to respondent under all the circumstances. He considered that the chief purpose of appellant's efforts was to save respondent from loss and that the purpose was fully accomplished. There is no room in the evidence to reverse that, as we have seen. The record shows that in the early part of the period of service the active agent in managing respondent, regarded the bank to be menaced by danger of losing some $10,000 or more, unless some such policy was adopted as the one resorted to. The testimony of other officers who did not know much about the difficulties, and perhaps were designedly kept in ignorance thereof by the cashier, that they regarded the bank secure, and on that account placed little value on appellant's services, cannot clearly outweigh the evidence supporting the findings. On the whole, the conclusion of the referee that about half the total value of the services, as sworn to by Hackett, or $25 per month, without expenses, which must have been considerable, should be charged to respondent, seems to have at least such fair support in the evidence as to leave no reasonable ground for holding such conclusion to be against the clear preponderance thereof.

By the Court.—The judgment and order on which it is based are reversed, and the cause remanded with directions to confirm the referee's report and render judgment accordingly.

KERWIN and TIMLIN, JJ., dissent.

SCHULTZ, Administrator, Respondent, vs. BECKER, Appellant.

January 11—January 31, 1911.

Appeal: Former decision: Law of the case: Same evidence on second trial.

The decision of the supreme court on appeal that there was no question for the jury on the first trial of the case is the law of the case upon a second trial and appeal, if the evidence was substantially to the same effect, even though on such second trial there was a greater quantity of evidence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action of conversion brought by the plaintiff as administrator of the estate of one Mary Becker to recover the value of bank certificates of deposit amounting to $1,200 which were the property of the deceased. The defendant claims title by virtue of a completed gift made just prior to Mary Becker's death. The case was here once upon appeal from a former judgment and is reported in 131 Wis. 235, 110 N. W. 214, where a statement of the leading facts will be found. As originally brought the action included a quantity of household furniture, and the trial court upon the first trial directed a verdict for the plaintiff as to all the property in dispute. Upon the former appeal this court held in effect that the court's ruling was correct as to the bank certificates, but that there was a jury question as to whether there had

been any conversion of the household furniture, and the case was sent back for retrial. Before the new trial took place the plaintiff abandoned all claim to recover for the household furniture, and the only question at issue upon the second trial was as to the bank certificates. The jury in response to special questions found in substance that after the making of the writing of gift, quoted at length upon the former appeal at pages 237 and 238, Mary Becker was informed by the scrivener that it was not valid and that it was abandoned and that a new method of transferring title by actual delivery of the certificates was undertaken. The court, however, upon motion set aside this finding and rendered judgment for the plaintiff on the ground that the testimony was substantially the same as upon the former trial and hence that the former judgment in this court settled the question of the validity of the alleged gift against the defendant. From this judgment the appeal is taken.

For the appellant there was a brief by *Humphrey Pierce* and *Francis S. Bradford,* and oral argument by *Mr. Pierce.*

Albert H. Krugmeier and *A. M. Spencer,* for the respondent.

WINSLOW, C. J. There is really but one question which it is necessary to consider in this case and that is whether there are any material facts testified to upon this trial which were not testified to upon the former trial. The trial judge found none, and after extended examination of the evidence upon both trials we think his conclusion was correct. Upon the first trial the defendant himself gave a very extended and circumstantial account of the entire transaction, beginning with the sending for Lockschmidt, the scrivener. He testified as to the conversations regarding the advisability of the making of a will, the directions given by Mary as to the kind of a paper she wished, the drafting of the paper referred to in the foregoing statement of facts, and then that a talk took place be-

tween him and Lockschmidt as to the best manner of transferring the bank certificates. Concerning this subject he testified on the former trial as follows: "Then I and Lockschmidt had a talk about that [the bank certificates], how that could be done, and we came to a conclusion; some one said, whether I or he, it would be the shortest way that she should sign and give them up and it was done so." He then detailed at length the circumstances of Mary's calling for the basket which was under the bed, undoing the bundle, making her mark on the certificates, asking for and obtaining the note of the defendant (printed upon the former appeal as Exhibit 3 on page 238), and finally the manual delivery to him of the certificates themselves.

Turning to the defendant's testimony upon the present trial, we find all these circumstances detailed in substantially the same way. It seems to us that it cannot be reasonably claimed that any difference exists between the two accounts, except possibly in one particular. Upon the first trial he testified, as before stated, that when the transfer of the bank certificates came up for consideration he and Lockschmidt "had a talk about that, how that could be done," and the conclusion reached was that she should sign and give them up at once. Upon the second trial he testified that when the transfer of the bank certificates came up he and Lockschmidt had some conversation and Lockschmidt said, "The writing is no good," and Mary said, "How will you fix it that it is good?" and after some further conversation between himself and Lockschmidt the latter said that if she (Mary) "was willing to give you the property she can give it to you now." Then follows the account of the getting of the certificates from the basket, the indorsement, the taking of defendant's note, and the manual delivery of the certificates to defendant, substantially as before.

We do not regard the difference in the two accounts of the conversation preceding the alleged delivery of the certificates as

of importance enough to differentiate them materially. On the former trial, as on this, the scrivener testified that he advised against the making of any such paper and that a paper of that kind would not amount to anything. If there be evidence now to justify a finding that the paper writing was discarded and manual delivery of the certificates substituted in its place (a point which seems to us very doubtful), we think it clear that there was such evidence upon the former trial, and hence that the decision then made by this court is controlling now. It is very significant in this connection that this exact claim was made by appellant upon the motion for rehearing filed after the decision upon the former appeal. In that brief it was said: "It is claimed that this writing was disregarded and superseded by Mary, and that by an independent action on her part she made an actual delivery of the certificates of deposit unconditionally." It seems to be the fact, as appellant claims, that the witness Lydia Schottler detailed upon the present trial certain language used by Lockschmidt which was substantially different from that given in her testimony before and which might afford some foundation for the claim that there was an abandonment of the paper writing. This, however, does not change the situation: the *quantum* of the evidence is not the test upon the question whether a verdict should or should not be directed. If there was substantial evidence on the first trial to the same effect as the evidence upon the second trial, the decision that there was no jury question on the first trial is *res adjudicata* upon the second trial, even though there be a greater quantity of evidence on the second trial.

By the Court.—Judgment affirmed.

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ABATEMENT of nuisance. See MUNICIPAL CORPORATIONS, 24–27.

ABATEMENT AND REVIVAL.

1. Prior to the enactment of ch. 353, Laws of 1907 (sec. 4253, Stats.), a cause of action at law for deceit did not survive and was not assignable. *Puffer v. Welch*, 506
2. Assuming, without deciding, that ch. 353, Laws of 1907, affects rights of action which accrued prior to and existed when that law went into effect, still it could not be retroactive in the sense that an assignment of an otherwise nonassignable cause of action made several years before that statute went into effect would be thereby made valid. *Ibid.*

ABUSE OF DISCRETION. See APPEAL, 5, 7.

ACCEPTANCE. See COMPROMISE AND SETTLEMENT. CONTRACTS, 1–3, 5, 6. FRAUDS, STATUTE OF. SALES, 5.

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ACTION.

By whom brought: Who may maintain. See BONDS, 2, 5, 6. COMMERCE.

Same: By taxpayer: Fraud: Quantum of proof.

In an action by a taxpayer to rescind a transaction whereby a county has acquired title to lands for a public purpose, the basis of the action being alleged fraud of public officers involving moral turpitude or the commission of a criminal offense, such fraud must be established by clear and satisfactory evidence, as distinguished from a mere preponderance of the evidence. *Neacy v. Supervisors of Milwaukee Co.* 210

Conditions precedent. See LOGS AND TIMBER, 1. MUNICIPAL CORPORATIONS, 8, 9, 18–20, 35.

Joinder of causes of action. See PLEADING, 1.

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ADJOURNMENT. See COURTS, 2, 5.

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AMENDMENT.

Of ordinance. See MUNICIPAL CORPORATIONS, 10, 11, 13, 16, 17.

Of pleading. See APPEAL, 12. MECHANICS' LIENS, 3. PLEADING, 3.

ANIMALS. See EVIDENCE, 2, 3.

APPEAL AND ERROR.

Grounds of appellate jurisdiction: Moot questions. See MANDAMUS, 6.

1. Although in a proceeding by *mandamus* to compel the placing of relator's name on a primary ballot there were delays so that the primary and the election passed, and the trial court thereafter adjudged that relator would have been entitled to the writ and awarded costs to him, the questions involved are properly before the supreme court on appeal from such judgment. *State ex rel. Burke v. Hinkel,* 444

Decisions reviewable: Appealable orders. See APPEAL, 5.

Right to review. See APPEAL, 3.

Same: Waiver.

2. An appellant who contends that there should have been a judgment dismissing the action on the merits instead of a judgment of discontinuance, did not waive his right to appeal from the latter judgment by taxing and recovering his costs prior to taking the appeal. *Puffer v. Welch,* 506

Presentation and reservation in lower court of grounds of review: Exceptions. See APPEAL, 8. WITNESSES, 1.

3. An order directing a verdict cannot be reviewed on appeal from the judgment unless exception to such order was taken at the trial. *Klotz v. Milwaukee E. R. & L. Co.* 384

Same: Bill of exceptions. See APPEAL, 12. MECHANICS' LIENS, 3.

4. The time limited in sec. 2876, Stats. (1898), for service of a proposed bill of exceptions may, after its expiration, be extended by the circuit court in discretion and upon conditions. *Sly v. Kilbourn City,* 203

5. An order so extending such time is within subd. 2, sec. 3069, Stats. (1898), and appealable if there is an abuse of discretion. Language used in *Hatch v. Kurtzweil,* 112 Wis. 231, and *Wood v. Blythe,* 42 Wis. 300, corrected and restrained. *Ibid.*

6. As a condition of granting such order the circuit court may require the moving party to stipulate that the cause be placed on the calendar for the next term of the supreme court and to perfect the appeal within ten days, in default of which the motion should be considered denied. *Ibid.*

7. There was no abuse of discretion in annexing such a condition to the order, where the moving party had ample time and means to comply with its terms. *Ibid.*

8. Where error is assigned upon the charge of the court, if the whole charge is not made a part of the record the bill of exceptions should affirmatively show that it does include the whole charge on the subject matter covered by the exception. *Clute v. Clintonville Mut. Fire Ins. Co.* 638

Assignment of errors. See APPEAL, 8, 16.

Review: Questions considered. See REFERENCE, 2.

9. Where a certificate of the trial judge under sec. 3052*m*, Stats. (Laws of 1909, ch. 429), dispenses with the necessity of an undertaking on appeal, the appeal raises only such questions as would be raised by an appeal and undertaking in the usual manner. Said statute does not authorize the judge to certify questions to the supreme court. *Kurath v. Gove A. Co.* 480

10. Notwithstanding confusion and uncertainty in the pleadings, evidence, and instructions, this court will search the record and if a right of recovery upon any ground appears to exist will permit plaintiff to assert it and the defendant to interpose any defense he may have. *Noble v. Libby,* 632

Same: Questions of fact: Weight of physical situations.

11. While the verdict of a jury should not be disturbed on appeal as being contrary to the evidence if there is any evidence which, in any reasonable view, will sustain it, and the decision of the trial court denying a motion to set it aside should not be overruled unless clearly wrong, nevertheless, physical situations and impossibilities sometimes controvert the testimony of witnesses given upon the stand and must be given controlling weight. *Houg v. Girard Lumber Co.* 337

Same: Presumptions. See REFERENCE, 1.

12. Where special damages have been awarded for breach of a contract it will be presumed on appeal, in the absence of any bill of exceptions, that if amendment was necessary the complaint was amended at the trial so as to permit recovery of such damages, and also, if evidence could show such damages to be proper, that such evidence was offered. *Archer v. Milwaukee Auto Engine & Supply Co.* 476

Same: Findings, when disturbed. See JURY, 4. REFERENCE, 3. TRIAL, 9, 13.

13. There being considerable evidence to support the trial court's decision of a preliminary question of fact upon which it based a ruling that a communication to an attorney was privileged, such decision will not be disturbed on appeal. *Dickson v. Bills,* 171

Same: Affirmance and reversal: Material and immaterial errors. See APPEAL, 11. CRIMINAL LAW, 1. DAMAGES, 10. HOMICIDE, 5, 7. INJUNCTION, 4. INSTRUCTIONS TO JURY, 1, 3–11. INSURANCE, 2, 3. MASTER AND SERVANT, 11, 30–32. NEW TRIAL, 1. RAILROADS, 7. TRIAL, 1, 5. WITNESSES, 1.

14. Error in admitting evidence is cured by striking it out and directing the jury to disregard it, unless it affirmatively appears that the accused was nevertheless prejudiced thereby. *Hedger v. State,* 279

15. A mere slip of the tongue causing a double negative is not always understood by ordinary people as an affirmative, and such mistake in a charge will not suffice for a reversal where the same proposition was many times stated correctly in the same charge and it is apparent the accused was not prejudiced by the error. *Ibid.*

16. A party who requests the submission of a question to the jury cannot on appeal assign such submission as error. *Clute v. Clintonville Mut. Fire Ins. Co.* 638

Same: Subsequent appeals: Law of the case.

17. The decision of the supreme court on appeal that there was no question for the jury on the first trial of the case is the law of the case upon a second trial and appeal, if the evidence was substantially to the same effect, even though on such second trial there was a greater quantity of evidence. *Schultz v. Becker.* 675

Judgment: Mandate: Allowing trial court to open judgment for equitable defense.

18. It is suggested (per MARSHALL, SIEBECKER, and KERWIN, JJ.) that the supreme court has power and, under the circumstances of this case, ought (although the judgment is affirmed upon an equal division of the justices) to send the cause back to the trial court with authority, in discretion and upon proper terms, to open the case so as to permit the interposition of an equitable defense. *Zohrlaut v. Mengelberg,* 564

APPEALABLE ORDERS. See APPEAL, 5.

APPLICATION OF PAYMENTS. See PAYMENT.

ASSIGNMENT of cause of action. See ABATEMENT AND REVIVAL.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 5, 19, 22, 28, 29.

ATTORNEYS. See APPEAL, 13. TRIAL, 1.

AUTOMOBILES.

See SALES, 4.

1. A verdict to the effect that the defendant was negligent in not keeping to the right of the middle of the traveled track while running his automobile on the highway at night is *held* to be sustained by evidence substantially the same as that held to sustain a similar verdict in *Pfeiffer v. Radke,* 142 Wis. 512, which was an action growing out of the same occurrence. *Pfeiffer v. Radke,* 430
2. For personal injuries sustained by a woman in the overturning of a buggy caused by defendant's negligence in running his automobile, an award of $800 (reduced from $1,500 by the trial court) is *held* to be sustained by the evidence. *Ibid.*

BALLOTS. See APPEAL, 1. ELECTIONS, 11–16.

BILL OF EXCEPTIONS. See APPEAL, 4–8, 12. MECHANICS' LIENS, 3.

BILLS AND NOTES.

Payment and discharge.

1. Where the holder of a promissory note demanded payment of a sum in excess of the amount legally due thereon as a condition of surrendering bonds pledged for its payment, and the makers, with knowledge of the facts, paid such excessive sum in order to obtain immediate possession of the bonds so that the necessary delivery could be made to a purchaser to whom they had made arrangements to sell the bonds, such payment was not made under duress, but was voluntary, and the excess so paid cannot be recovered. *Burgess v. Commercial Nat. Bank,* 59
2. An allegation in such case that defendants (the payee of the note and a bank with which it had been left) "conspired together to fraudulently exact from plaintiffs an excessive amount of interest" was insufficient, when construed with the other allegations of the complaint, to show actionable fraud. *Ibid.*

BOARD OF TRADE. See GAMING, 1, 2.

BONDS.

Requisites and validity. See MUNICIPAL CORPORATIONS, 33-39.

Liability of sureties: Rights of action. See PRINCIPAL AND SURETY.

1. Under the act creating a district court in Milwaukee county (ch. 218, Laws of 1899) and making the clerk of the municipal court *ex officio* clerk of such district court, without requiring of him an additional bond or oath of office, the bond given by him as clerk of the municipal court covered his acts as clerk of the district court also. *Milwaukee v. United States F. & G. Co.* 603

2. A bond given by the clerk of the municipal court of Milwaukee county to the city of Milwaukee, conditioned as stated in the opinion, is *held* broad enough to entitle the city to recover thereon for moneys which such clerk is required to pay over to the city treasurer, although they do not belong to the city but are to be paid over in turn to the county treasurer or as fees to witnesses. *Ibid.*

3. A bond given by a public officer is not deprived of its character as an official statutory bond by the fact that it differs in verbiage from the bond prescribed by statute, or by the further fact that it covers *all* of his official duties, while the statute requires one covering only the single duty of paying over moneys. In such case the surplusage will be rejected and the bonds sustained as to the statutory conditions which it includes. *Ibid.*

4. Such a bond being an official and statutory bond to the extent that it includes statutory conditions, the liability so far as such conditions are concerned is to be construed and enforced with the aid and in the light of all statutory provisions bearing thereon. *Ibid.*

5. Where the bond of the clerk of a municipal court is required to be given *to the city*, such city is the proper party to sue for a breach of its conditions in failing to pay over moneys, regardless of the ultimate disposal of such moneys or whether or not the city is the real party in interest. The city in such case is the trustee of an express trust within sec. 2607, Stats. (1898). *Ibid.*

6. Notwithstanding sec. 4816, Stats. (1898),—re-enacted from R. S. 1878,—requires forfeited bail moneys to be paid into the county treasury, ch. 36, Laws of 1897, being a special act applying to the municipal court of Milwaukee county, governs in respect to that court and requires bail moneys forfeited therein to be paid over to the city treasurer. *Ibid.*

BOUNDARIES.

The finding of a jury as to which one of two conflicting surveys established the true boundary line between the lands of the parties is *held* to be sustained by the evidence. *Stickney v. Bell,* 176.

BROKERS.

See GAMING.

Option to purchase: Assignment: Fraudulent representations.

1. Where the owners of property, wishing to sell it for a certain net price and to secure to selling agents, as a commission, all that could be obtained in excess of such price, gave to the agents an

option to purchase the property at said price, the mere fact that such option ran to the agents "and their assigns" did not render misrepresentations made by the owners to such agents available as the basis of an action of deceit in favor of other persons, not purchasers of the property, to whom such agents afterwards assigned an interest in the option. *Puffer v. Welch*, 506

[2. Whether agents to whom an option is given for such a purpose can create other agents with equal authority, by assigning to persons, not purchasers of the property, undivided interests in such option, not determined.] *Ibid.*

3. The word "assigns" in such option means purchasers of the property to whom the agents might transfer the option, not other persons to whom the agents might transfer an interest in the option for the purpose of creating other agents of the owner. *Ibid.*

4. An action by assignees of such option to recover damages on account of false representations made by the owners, by reason of which the holders of the option were unable to make a sale and lost their time and money expended in the attempt to sell and their prospective profits on a sale, is an action for unliquidated damages caused by deceit. *Ibid.*

5. To support an action of deceit the misrepresentations must have been made to the plaintiff, or to a third person with the intention that they be communicated to plaintiff, or so made to a class of which the plaintiff is a member, or so made to the public generally,—in each case with the intention on the part of the person making such misrepresentations that the plaintiff should rely and act thereon; and plaintiff must have so relied and acted. *Ibid.*

6. Misrepresentations which accompanied the giving or induced the acceptance of a written instrument running to the vendee or obligee therein named "and assigns," do not run with the instrument so as to give a right of action in favor of persons to whom they were not uttered or addressed or intended to be communicated. *Ibid.*

BUILDING OPERATIONS. See MASTER AND SERVANT, 18–21.

BURDEN OF PROOF. See CONTRACTS, 2. INSTRUCTIONS TO JURY, 3. MUNICIPAL CORPORATIONS, 20. NEGLIGENCE, 3.

CARRIERS. See RAILROADS.

CAUSA MORTIS. See GIFTS.

CERTIORARI. See MANDAMUS, 3.

CHALLENGES. See JURY, 4.

CHANGE OF VENUE. See VENUE.

CHARACTER. See INSTRUCTIONS TO JURY, 11.

CHARITABLE TRUSTS. See TRUSTS AND TRUSTEES.

CIRCUMSTANTIAL EVIDENCE. See CRIMINAL LAW, 3.

CITIES. See BONDS, 1, 2, 5, 6. MUNICIPAL CORPORATIONS. SCHOOLS AND SCHOOL DISTRICTS, 1. TRUSTS AND TRUSTEES, 2, 8. WILLS, 2.

CLASSIFICATION. See CONSTITUTIONAL LAW, 4. MUNICIPAL CORPORATIONS, 31.

CLERKS OF COURTS. See BONDS, 1, 2, 5.

COMITY. See PRINCIPAL AND SURETY.

COMMERCE.

A contract of sale made by correspondence between the seller in this state and the buyer in another, providing for shipment of goods from this state to the other, is a transaction of interstate commerce, and the buyer, though a foreign corporation not licensed in this state, may maintain an action here for breach of the contract. *Southern F. & G. Co. v. McGeehan,* 130

COMMERCIAL PAPER. See BILLS AND NOTES.

COMMON CARRIERS. See RAILROADS.

COMMON COUNCIL. See MUNICIPAL CORPORATIONS, 7, 14–17, 21, 26.

COMPARATIVE NEGLIGENCE. See RAILROADS, 16–22.

COMPLAINT. See BILLS AND NOTES, 2. MECHANICS' LIENS, 3. PLEADING, 1.

COMPROMISE AND SETTLEMENT.

Where a check or draft is sent by letter with a statement of account showing a balance due the person to whom the letter is sent equal to the amount of the check or draft, together with a statement that this is sent as settlement in full, the party receiving such letter cannot accept and retain the avails of the check or draft and at the same time deny that he received it in full settlement. *Thomas v. Columbia Phonograph Co.* 470

CONDITIONS. See APPEAL, 6, 7. LOGS AND TIMBER, 1. MUNICIPAL CORPORATIONS, 3–5, 8, 9, 18–20, 35. VENDOR AND PURCHASER, 1.

CONDUCT OF COUNSEL. See TRIAL, 1.

CONJECTURE. See NEGLIGENCE, 4.

CONSTITUTIONAL LAW.

Construction and operation of constitutional provisions. See SCHOOLS AND SCHOOL DISTRICTS, 1.

Legislative powers. See COURTS, 2. ELECTIONS, 1–17. JUSTICES' COURTS, 1. RAILROADS, 2.

1. The extent to which the legislature may go in the way of regulation of rights is primarily a matter of legislative judgment, subject, however, to judicial review. *State ex rel. McGrael v. Phelps,* 1
2. The review mentioned has no regard to expediency; it has regard only to whether, from any fair point of view, the regulation, as a conservation measure, is legitimate, every reasonable doubt being resolved in favor thereof. *Ibid.*

Judicial powers. See CONSTITUTIONAL LAW, 1. JUSTICES' COURTS, 1. RAILROADS, 1.

Police power. See MUNICIPAL CORPORATIONS, 21–31.

3. The validity of a legislative police regulation depends upon whether the ends sought to be attained are appropriate, and the means to such ends are also appropriate. *State ex rel. McGrael v. Phelps,* 1

Same: Classification. See MUNICIPAL CORPORATIONS, 31.

4. Classification for the purpose of valid police regulation may be based upon differences in the opportunity or facility for inspec-

tion inherent in the different classes, although danger of infection from each in case of actual contact might be equal. *Adams v. Milwaukee,* 371

Declaration of rights: Legislative limitations.

5. Sec. 1, art. I, of the constitution is a prohibition, by necessary implication, of legislation inconsistent therewith. *State ex rel. McGrael v. Phelps,* 1

Political rights. See ELECTIONS.

CONTINUANCE. See COURTS, 2-6.

CONTRACTS.

Entire contracts. See LOGS AND TIMBER, 1.

Executory contracts. See DAMAGES, 6, 7.

Implied contracts. See MASTER AND SERVANT, 1.

1. If a person performs valuable services for another at that other's request, the law implies, as a matter of fact, the making of a promise by the latter and its acceptance by the former to pay the one performing the services the reasonable value thereof. *Wojahn v. National Union Bank,* 646
2. If one merely accepts services from another which are valuable to him, the presumption arises, in general, that such services are to be paid for, and the burden of rebutting such presumption is upon the recipient; but such burden is more easily lifted than when the services are rendered by request. *Ibid.*
3. When the referee or court has found the facts from which the law implies the promise and its acceptance, it is unnecessary, though not improper, to find in terms that the parties made a contract by implication. *Ibid.*
4. The existence of an implied contract need not be shown by undisputed evidence, but may be established by the preponderance of conflicting evidence. *Ibid.*

Requisites and validity in general. See CORPORATIONS, 1, 2. EVIDENCE, 1. GAMING. MUNICIPAL CORPORATIONS, 14-17. SCHOOLS AND SCHOOL DISTRICTS, 2-4. TRUSTS AND TRUSTEES, 3.

Same: Acceptance and assent.

5. One who, through misrepresentation as to its purport, is induced to refrain from examining a writing given him by another will not, unless in an extreme case, be held to have assented to the contents of the document before they were in fact known to him. Reasonable diligence on the part of the recipient is all that is required. *Lotter v. Knospe,* 426
6. Plaintiff paid money to defendant under an oral contract of sale and received back a writing which defendant told him was a mere receipt, but which in fact recited some parts of the contract, omitting a condition of the sale. Plaintiff did not examine the paper, but nine days later, pursuant to the condition, demanded return of his money and promptly began suit therefor. *Held,* that he had not assented to and was not bound by the writing as correctly embodying the oral agreement. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, and *Ripley v. Sage L. & I. Co.* 138 Wis. 304, distinguished. *Ibid.*

Construction and operation in general. See CORPORATIONS, 3. DAMAGES, 4. LOGS AND TIMBER, 1, 2. MUNICIPAL CORPORATIONS, 18–20. SALES. VENDOR AND PURCHASER.

7. Pursuant to a previous written contract, the parties exchanged lands as therein agreed, with the exception of one lot the title to which was in litigation, and defendant agreed in writing to pay plaintiff $500 if he should be unable to give title to that lot by a certain date. *Held*, that the two contracts should be construed together, the original contract remaining in force and binding plaintiff to carry out any stipulations on his part which remained unperformed, and defendant's new promise being in the nature of security for performance on his part. *Gross v. Salsich*, 419

8. Within the time limited defendant perfected his title to the unconveyed lot and tendered a proper conveyance to plaintiff upon condition that the latter pay over a certain excess of rents which he had in the meantime collected and which defendant was entitled to under the original contract. *Held*, that such condition was reasonable and proper and the tender sufficient under the contract. *Ibid.*

[9. Whether, if defendant being able had absolutely refused to convey under any circumstances, plaintiff could maintain an action to recover the $500, or whether his remedy would be for specific performance, not decided.] *Ibid.*

10. Where the correspondence between a manufacturer of lumber and a jobber, with reference to a quantity of lumber ordered for a brewing company, in part indicated that a sale to the jobber was intended, and in part indicated a mere agency arrangement, the evidence, stated in the opinion, is *held* to sustain a finding of the trial court that the transaction was a sale to the jobber. *First Nat. Bank v. Snell*, 433

Same: Net profits.

11. The term "net profits" and the word "profits" ordinarily mean the same thing. *Thomas v. Columbia Phonograph Co.* 470

12. The term "net profits," when applied to a course of dealing including several successive transactions, involves the idea of time and, if unqualified by custom, usage, or other words in the contract, ordinarily refers to the termination of the adventure. It may, however, refer to the expiration of some fiscal period, less than and within the period of adventure, at the end of which profits are to be computed. *Ibid.*

13. Where the whole period of adventure covers several fiscal periods designated for the purposes of computation, losses and gains arising out of matters covered by the earlier fiscal period but occurring after ascertainment of the profits for that period are carried into and increase or diminish the net profits in the next or some succeeding fiscal period. Anything included in the profits of any fiscal period during the adventure which afterwards turns out to be a loss goes to diminish the net profits of the next or some succeeding period. *Ibid.*

14. Where a contract of employment entitled the employee to receive a commission of ten per cent. of the net profits up to $2,000 per month and thereafter on the basis of five per cent. of such profits, and computations were made monthly, net losses in one

month should be deducted from net profits in others in computing the commissions. The fiscal period for computation of the net profits in such case is the month, but the real period to which the term "net profits" refers is the period of the employment. *Ibid.*

15. Rendering and receiving monthly statements in which the net profits of one month were reduced by the losses in another month also places this interpretation on the contract. *Ibid.*

Same: By whom construed.

16. The construction of a written contract is for the court; as is also the question what interpretation the parties placed thereon by subsequent written communications. *Thomas v. Columbia Phonograph Co.* 470

Rescission. See SALES, 4–6.

Performance or breach. See DAMAGES. LOGS AND TIMBER, 3.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 6, 14. NEGLIGENCE, 3. RAILROADS, 15.

CORONER'S VERDICT. See HOMICIDE, 9.

CORPORATIONS.

Incorporation: When existence begins: Power to contract.

1. Under our statutes a corporation comes into being on the filing of its articles with the register of deeds, and from that time may bind itself by contract; and the signers of the articles have authority to manage its affairs. *Sentinel Co. v. A. D. Meiselbach M. W. Co.* 224

2. Evidence stated in the opinion is *held* sufficient to sustain a verdict to the effect that one of the signers of the articles of incorporation was authorized to bind the corporation by contract. *Ibid.*

Capital stock: Sales.

3. The question being whether a contract to sell at a future time "twenty-five shares of the five hundred shares of the capital stock" of a corporation should be construed as being for the sale of a one-twentieth interest only in the corporation, so that after reduction of the outstanding stock to 326 shares the sale was of one twentieth of that number only, the court divided equally. *Zohrlaut v. Mengelberg,* 564

Officers: Suspension by governing body: Trial. See MANDAMUS, 1–3.

4. Where the laws of an assessment insurance society provide that every officer against whom charges have been preferred "shall have a just and impartial trial in accord with the laws and rules of this body," such officer is entitled at least to be advised of the charges and given an opportunity to be heard, even though there are no specific regulations governing the procedure. *State ex rel. Weingart v. Board, etc. G. U. G. Germania,* 516

5. A law of such a society providing that every officer against whom charges have been preferred "shall be suspended from his office until the case is decided," etc., must be given a reasonable construction, and in this case is *held* not to refer to fugitive charges made by an individual on his own responsibility, but only to

charges formulated and presented by some local council or other authoritative body after investigation; since otherwise the society might be without any officers for long periods. *Ibid.*

Foreign corporations. See COMMERCE.

6. Under sec. 1770*b*, Stats. (1898), an unlicensed foreign corporation, when sued upon a contract void in its behalf but enforceable against it, may establish as a defense any facts which will in whole or in part defeat plaintiff's right to recover, but is precluded from obtaining affirmative relief upon any cause of action or counterclaim arising out of the contract. *Rib Falls L. Co. v. Lesh & M. L. Co.* 362

COSTS.

Persons liable.

1. Officers of an assessment insurance society having acted arbitrarily and without jurisdiction in excluding other officers, costs were properly awarded against them personally, upon the granting of a peremptory writ of *mandamus* directing reinstatement of the excluded officers. *State ex rel. Weingart v. Board, etc. G. U. G. Germania,* 516

Security for payment. See COURTS, 1.

Amount, rate, and items.

2. Under the third paragraph of sec. 2921, Stats. (1898), costs may be taxed for notices given under sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307). *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 321

3. Disbursements for sheriff's fees for serving summons may be allowed in the taxation of costs, although not itemized in the bill. *Ibid.*

4. Although the depositions of witnesses had previously been taken, fees for their travel and attendance at the trial were properly allowed and taxed, fees for attendance at the taking of the depositions being disallowed. *Ibid.*

COUNTERCLAIM. See PLEADING, 2.

COUNTIES. See ACTION.

COURT AND JURY. See APPEAL, 3. CONTRACTS, 16. GAMING, 3. MASTER AND SERVANT, 23, 29. RAILROADS, 18.

COURTS.

Nature, extent, and exercise of jurisdiction.

1. Prior to the commencement of an action by a nonresident of this state against residents, money was deposited by a person not a party to the action to indemnify sureties for any loss they might sustain by signing an undertaking for costs on behalf of the plaintiff and to indemnify his attorneys for any costs which might be awarded against them. *Held,* that the court in which the action was tried had no jurisdiction to direct the application of any part of such money to a purpose other than that for which it was deposited, without the consent of the depositor, even though the attorneys for all parties to the action stipulated that it be so applied. *Nobarak v. Simmons,* 187

Terms of court.

2. In view of the power granted by sec. 2424, Stats. (Supp. 1906: Laws of 1905, ch. 6), to adjourn one term of court beyond the

beginning of the next for any specific business to be named in the order of adjournment, the provision of sec. 2878, Stats. (Supp. 1906: Laws of 1901, ch. 100), that a motion for a new trial made upon the minutes of the court, if not decided during the same term, shall be taken as overruled, is not unreasonable as denying to the trial judge adequate time to consider and determine the matters involved, but is a valid enactment. *Kurath v. Gove Automobile Co.* 480

3. The parties may waive the provisions of said sec. 2878, and the judge can then decide the motion at any time; but no waiver can be inferred from the mere fact that no objection is made by either party at the time the motion is taken under advisement. *Ibid.*

4. An order cannot be entered after the term, *nunc pro tunc* as of a day of the term at which the motion was made, since to permit that would be to render the statute nugatory. *Ibid.*

5. To keep the motion alive under said sec. 2424, the judge must do so by special order at the close of the term; and he must dispose of it within the time fixed for the adjournment of the term, as the statute makes no provision for a second adjournment. *Ibid.*

6. The provision of that portion of sec. 2424 relating to the second circuit, which declares that any trial, hearing, argument, or assessment commenced at one term but not concluded "shall be continued and proceeded with at the next term in the manner and with like effect as though it had been commenced at that term," relates to some proceeding in which the parties or their attorneys participate, and not to the mere taking under advisement of the decision of a hearing or argument already concluded by the parties. *Ibid.*

District courts. See BONDS, 1, 2, 5, 6.

Justices' courts. See JUSTICES' COURTS.

Municipal courts. See BONDS, 1, 2, 5, 6.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See HOMICIDE.

Former jeopardy. See JURY, 1–3.

Trial: Evidence: Competency and materiality.

1. Testimony that the accused mortgaged his homestead to raise money to defray expenses of his trial is *held*, though irrelevant and immaterial, not to have been prejudicial. *Hedger v. State,* 279

2. Evidence tending to show that police officers acted without authority in searching the premises of the accused and seizing his personal property, is not competent unless some of the property or papers so seized are offered in evidence on the part of the state and objection is made on the ground that the instruments of evidence so offered were procured in this unlawful way. *Ibid.*

Same: Circumstantial evidence.

3. Circumstantial evidence, stated in the opinion, is *held* sufficient to support a verdict of guilty. *Hedger v. State,* 279

CROSS-EXAMINATION. See WITNESSES, 3–5.

CUSTOM AND USAGE. See CONTRACTS, 12. MASTER AND SERVANT, 21.

DAMAGES.

Grounds. See WATERS AND WATERCOURSES, 4, 5.

Liquidated damages. See BROKERS, 4.

Measure of damages. See MASTER AND SERVANT, 3. SALES, 1, 3.

1. "Where two persons have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Foss v. Heineman,* 146
2. The foregoing applies to all ordinary cases, but there is this common exception, in case of there having been special circumstances, mutually known to both parties at the time of making the contract; then the damages resulting from the breach of such contract, which they would reasonably have contemplated, would be the amount of injury ordinarily flowing from a breach of contract under such special circumstances. *Ibid.*
3. The result of the primary rule is, that, in case of a breach of contract to sell and deliver personal property, there being no mutually known special circumstances existing at the time of making the contract, and no special circumstances occurring subsequently to supersede or vary the ordinary rule; the executory vendee is entitled to recover the difference between the purchase price and the fair market value at the agreed place and time for delivery with interest from the time of the breach. *Ibid.*
4. The rule of damages aforesaid for all ordinary contracts, no agreement having been made to the contrary, is written into them by operation of law at the time of making; the result waits upon the breach and application of the rule to the then existing conditions. *Ibid.*
5. The reason of any rule or measure of damages is that, a person wronged by breach of contract should be as fully as practicable, compensated for his loss; so when the rule applicable to a situation does not reasonably so result, it is superseded or varied by some exception, to effect the policy of the law. *Ibid.*
6. If a person agrees to sell and deliver to another at a specified time, price, and place, certain personal property, and such other, thereafter, agrees to resell and deliver at a specified advanced price, to a third person, all such property received from such person, thereby saving himself from any claim for damages because of being unable to deliver to the second vendee the whole thereof, and such person defaults, such other's recoverable damage for the breach is the difference between his agreed purchase and selling price. *Ibid.*
7. The ordinary measure of damages for failure to deliver goods on an executory contract of sale is the difference between the contract price and the market value at the time and place of delivery. *First Nat. Bank v. Snell,* 433
8. The exception to this rule which allows, under some circumstances, a recovery for loss of profits where the vendor knows

the goods are bought to fill a pre-existing contract, does not apply to a case where it appears that the goods could be, and in fact a portion of them was, purchased in the open market. *Ibid.*

9. In an action for breach of warranty on a contract to furnish connections and accessories and install an engine in a boat, the measure of damages is the difference between the value of the boat in the condition in which it was delivered and what its value would have been had the contract been complied with, as well as such special damages as are properly shown. *Archer v. Milwaukee Auto Engine & Supply Co.* 476

10. An award of damages in such case "(a) for the difference in value between the connections, accessories and labor furnished, and that called for by the contract," and also "(b) for the expenses actually incurred by the plaintiff in putting the connections, accessories and installation work in the boat in a condition to correspond with the contract," is erroneous because involving duplication, the second item, so far as proper, being included in the first. *Ibid.*

11. The second item above mentioned should in any case have covered only the expenses *reasonably* and *necessarily* incurred. *Ibid.*

Excessive damages. See AUTOMOBILES, 2.

DAMS. See WATERS AND WATERCOURSES.

DEATH. See ELECTIONS, 20–24. MASTER AND SERVANT, 4, 6. RAILROADS, 13, 15, 16.

DEBTOR AND CREDITOR. See BILLS AND NOTES. COMPROMISE AND SETTLEMENT. CONTRACTS. DAMAGES. DURESS. FRAUDS, STATUTE OF. GAMING. INSURANCE. LOGS AND TIMBER. MASTER AND SERVANT, 1–3. MECHANICS' LIENS. PAYMENT.

DECEIT. See ABATEMENT AND REVIVAL, 1. BROKERS, 1, 4–6. MASTER AND SERVANT, 2.

DELEGATION OF LEGISLATIVE POWER. See RAILROADS, 2.

DELIVERY. See FRAUDS, STATUTE OF. GAMING. GIFTS. SALES, 1, 2.

DEPOSITIONS. See COSTS, 4.

DIRECTING VERDICT. See APPEAL, 3.

DIRECTORY STATUTES. See SCHOOLS AND SCHOOL DISTRICTS, 4.

DISCONTINUANCE. See APPEAL, 2. DISMISSAL AND NONSUIT.

DISCRETION. See APPEAL, 4, 5, 7. DISMISSAL AND NONSUIT, 1. HOMICIDE, 6. JURY, 4. VENUE.

DISMISSAL AND NONSUIT.

See APPEAL, 2.

1. Ordinarily it is within the discretion of the trial court to permit the plaintiff to discontinue an action at law in which no counterclaim is interposed, where the application for leave to discontinue is timely made. *Puffer v. Welch,* 506

2. Where a complaint fails to state a cause of action and is first challenged by demurrer and motion for judgment on the pleadings, and plaintiff thereafter bases his request for a discontinuance upon an admission that a plea in bar contained in the answer is true, and defendant again requests the trial court to

dispose of the objection going to the sufficiency of the complaint before granting leave to discontinue, it is error to permit the discontinuance of the action instead of disposing of it on the other grounds first before the court. *Ibid.*

3. The disposition of the case, under such circumstances, should be that which will define rights and finish litigation rather than that which will leave the case open for further and perhaps fruitless and expensive litigation. *Ibid.*

DISTRICT COURTS. See BONDS, 1, 2, 5, 6.

DISTRICT SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS, 1.

DIVERSION. See TRUSTS AND TRUSTEES, 6.

DIVORCE.

Alimony, allowance and division of property.

In an action in which both parties asked for a divorce on the ground of cruel and inhuman treatment by the other, it is *held*, upon the evidence, that the divorce was properly granted to the wife and that an award to her of $3,500 as a final division of the husband's estate (valued at $25,000 to $30,000) should not be disturbed upon an appeal by her. *Herrmann v. Herrmann*, 380

DURESS.

See BILLS AND NOTES, 1. TRIAL, 10.

1. Duress, in its broad sense, now includes all instances where a condition of mind, caused by fear of personal injury or injury to one's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering the person affected incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion. *Price v. Bank of Poynette*, 190

2. To constitute duress by threats they must be of such a nature and made under such circumstances as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must have been performed by him while in such condition. *Ibid.*

3. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself, but the controlling element in each case is whether the means used, considering all the circumstances of the case, are such as to prevent the free exercise of the will power. *Ibid.*

4. It is not necessary that threats of criminal prosecution, when these are the means used, should be made directly; if made to a third person with intent that they be communicated, and they are so communicated, that is sufficient. *Ibid.*

5. The evidence in this case is *held* to support the verdict to the effect that plaintiff was induced by threats of arrest and prosecution of his son for misappropriation of the funds of a bank in which the son had been employed, to sign a bill of sale of

the property in question, and that such threats so affected his mental condition that he was incapable of the free exercise of his will power. *Ibid.*

ELECTIONS.

Right of suffrage and regulation thereof.

1. In general, a legislative interference with the elective franchise must stand the test, at least, of these fundamentals of the state constitution:
(a) The express and implied inhibitions of class legislation;
(b) The recognized existence and inviolability of inherent rights;
(c) The constitutionally declared purpose of government;
(d) The express guaranty of the right to vote. *State ex rel. McGrael v. Phelps,* 1

2. The right of suffrage includes the right to form political parties, and the right of each party to have all the machinery, not reasonably prohibited by law, for making its organization effective as to the policy of its members, by electing officers in harmony therewith. *Ibid.*

3. Every legislative interference with freedom of voters to form political organizations and act under their respective party names is, at the same time, an interference with the right to vote; so the limit of power as to one is substantially the limit as to the other. *Ibid.*

4. Rights mentioned in the last foregoing are included in sec. 1, art. I, of the constitution and are, by necessary implication, protected thereby from undue legislative interference, and are likewise protected by the limitation (in the words of grant) in sec. 1 of art. III of the constitution. *Ibid.*

5. Notwithstanding constitutional inhibitions of legislative interference with the right to vote and rights incidental thereto, there is a legitimate field of legislative activity in the nature of regulation. *Ibid.*

6. The field of legislative regulation mentioned does not extend beyond making laws which are reasonable. *Ibid.*

7. The scope of reasonable regulation is indicated by its purpose, viz.: to conserve guaranteed rights and promote their efficiency. *Ibid.*

8. The office of regulation being to conserve, a regulation going clearly beyond, into the field of impairment, is unreasonable. *Ibid.*

9. A regulation which necessarily tends to afford one political party of substantial status a better opportunity for efficient existence than another, however large, or materially impair or prevent fair opportunity for any organization of voters of substantial numbers and standing to compete for favor, is an unreasonable interference. *Ibid.*

10. A legislative interference with freedom, as regards political party organization and contest, which naturally impairs opportunity for members of any political party of substantial significance to efficiently maintain their organization, and, to that end, pre-

sent their party candidates and principles, as such, to the voters at large for indorsement, is unreasonable. *Ibid.*

11. Legislative regulations of the right to vote and rights incidental thereto are appropriate to at least these ends:
(a) To keep the ballot sheet within a reasonably workable compass, both from the standpoint of the party and the individual right;
(b) To promote such party integrity on the only legitimate basis for legal conservation of party existence, as to discourage electors claiming to belong to one organization from invading the primary of another;
(c) To stimulate exercise of the right to participate by voting in public matters. *Ibid.*

12. A legislative condition of a person having his name, as that of a party nominee, placed on the official ballot, under his party designation, in a special party column, that he shall have received a sufficient number of votes for such place at the preceding primary to fairly indicate that he is such party's nominee, and that the party has a reasonably significant membership, is in the field of legitimate regulation respecting the suitableness of the ballot, both as regards the major and minor election districts. *Ibid.*

13. Some standard of measurement by which to test the competency of a political party to have the use of the official ballot sheet for the purpose of a party ballot follows, necessarily, from the use of the Australian ballot form. *Ibid.*

14. The votes cast in an official district for a party nominee for governor, is a proper basis from which to derive a unit of measurement for such party's status at the succeeding primary election, and a number equal to twenty per cent. thereof is a fair unit by which to determine the minimum of party strength in such district, required to be shown at such primary by such party, as to any particular office for such district, to entitle the person favored as the party nominee to have his name placed, as such, in the party column on the official ballot at the succeeding election. *Ibid.*

15. The means indicated for regulating the workable size of the ballot sheet applies to minor districts as well as the state at large; treating a political party as having, in a sense, an individuality in each official district separate and apart from that in any other district. *Ibid.*

16. The method mentioned for regulating the size of the official ballot sheet, is also a proper means of regulation to prevent participation by members of one party in the contests between candidates at the primary, of another party. *Ibid.*

17. Such method is also a legitimate means of stimulating exercise of the elective franchise. *Ibid.*

Primary elections. See APPEAL, 1. ELECTIONS, 11, 14, 16, 24.

18. In ch. 477, Laws of 1909,—providing that if the aggregate of votes at a primary election for all candidates "for nomination for any one office voted for on any party ballot" shall be "twenty per cent. or more" of the number "cast for nominee of such party for governor at the last general election" the one receiving the most votes shall have his name "placed on the official

ballot at the following election" as such party's candidate for such office, and if such aggregate shall be less than such per per cent. such person shall have his name placed on such ballot with individual nominations under the designation "independent,"—by necessary implication, the words—for the particular official district involved or words of similar import—should be deemed in place after the words "for any one office" and the words—in such district or words of similar import—after the word "governor." *State ex rel. McGrael v. Phelps*, 1

19. The literal sense of the words "vote cast for nominee of such party for governor," standing alone, is so contrary to the apparent legislative intent, that words, as before indicated, should be deemed in place by reasonable, if not necessary, implication. *Ibid.*

20. The provisions of the general election law contained in sec. 34, Stats. (1898), relating to the filling of vacancies caused by declination, death, or other disability of a nominated candidate, are not imported into the primary election law or made applicable to primary elections, although sec. 11—25, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 25), declares that the provisions of the general election law in relation to the manner "of counting the ballots and making return thereof, and all other kindred subjects, shall apply to all primaries in so far as they are consistent with" the primary election law. *State ex rel. Bancroft v. Frear*, 79

21. The death, before a primary, of one of several candidates for a party nomination at such primary does not create a "vacancy" which can be filled by the party committee either before or after such primary. *Ibid.*

Ballots. See APPEAL, 1.

Count of vote.

22. A dead man is not a "person" within the meaning of sec. 11—18, Stats. (Supp. 1906: Laws of 1903, ch. 451, sec. 18). *State ex rel. Bancroft v. Frear*, 79

23. Votes which are in form cast for a deceased person by voters who know the fact of his decease cannot be considered as votes for or against any person, but must be regarded as so much blank paper. *Ibid.*

24. During a campaign in which factional lines were closely drawn, five days before the primary election, and after the ballots therefor were printed, a candidate for the nomination for the office of attorney general came to his death by drowning. The fact of his death was published generally in the newspapers throughout the state, which further stated that if he received a plurality of votes at the primary the state central committee could fill the vacancy. Such statement was repeated in certain letters sent to many parts of the state and in numerous telegrams sent to supporters of one faction, calling upon them to urge voters to vote for the decedent notwithstanding his death. *Held*, that from these facts (admitted on demurrer) the court would infer that of the 63,482 votes cast for the decedent more than enough to give him the plurality of 5,286 which he received were cast by persons who knew that he was dead. *Ibid.*

EMINENT DOMAIN.

Necessity for condemnation.

The power of eminent domain need not be exercised where a municipality and a person whose land is desired for public use agree upon the amount to be paid therefor; and such agreement may properly be reached through the aid of appraisers whose valuation of the land is not to be binding upon either party but to be treated as advisory only. *Neacy v. Supervisors of Milwaukee Co.* 210

Public use. See RAILROADS, 3.

ENTIRE CONTRACTS. See LOGS AND TIMBER, 1.

ESCROW. See VENDOR AND PURCHASER, 1.

ESTOPPEL. See MUNICIPAL CORPORATIONS, 17.

EVIDENCE.

Parol evidence. See SALES, 2.

Circumstantial evidence. See CRIMINAL LAW, 3.

Judicial notice.

1. In an action on *quantum meruit* to recover for newspaper advertising, the dates of publication appearing from the evidence, the court was bound to take judicial notice that certain of the advertisements were published on Sunday. *Sentinel Co. v. A. D. Meiselbach M. W. Co.* 224

Presumptions. See CONTRACTS, 2. INSTRUCTIONS TO JURY, 5.

Burden of proof. See CONTRACTS, 2. INSTRUCTIONS TO JURY, 9. MUNICIPAL CORPORATIONS, 20. NEGLIGENCE, 3.

Materiality and competency. See CRIMINAL LAW. HOMICIDE.

Res gestæ. See WILLS, 1.

Opinion evidence: Subjects of expert testimony. See TRIAL, 2.

Same: Competency of experts. See WITNESSES, 4.

2. Veterinarians, shown to be graduates of veterinary colleges and to have actually practiced a number of years, were competent to testify as to glanders in a horse, where it was not shown that they derived their knowledge from books exclusively but was fairly to be inferred that they were testifying from experience. *Miske v. Thom,* 178

Same: Operation and effect. See INSTRUCTIONS TO JURY, 6.

Weight and sufficiency. See ACTION. APPEAL, 11, 12. AUTOMOBILES. BOUNDARIES. CONTRACTS, 4, 10. CORPORATIONS, 2. CRIMINAL LAW, 3. DURESS, 5. INSURANCE, 1, 4. MASTER AND SERVANT, 4, 16, 19, 21, 24. RAILROADS, 23, 25. TRIAL, 5.

3. Evidence that a horse was sold within a week or two prior to his delivery to the purchaser on May 12, and that in the early part of June he was suffering from an advanced case of a disease which would take two or three months to develop to that stage, was sufficient to support a verdict that the horse was suffering from that disease when sold. *Miske v. Thom,* 178

month should be deducted from net profits in others in computing the commissions. The fiscal period for computation of the net profits in such case is the month, but the real period to which the term "net profits" refers is the period of the employment. *Ibid.*

15. Rendering and receiving monthly statements in which the net profits of one month were reduced by the losses in another month also places this interpretation on the contract. *Ibid.*

Same: By whom construed.

16. The construction of a written contract is for the court; as is also the question what interpretation the parties placed thereon by subsequent written communications. *Thomas v. Columbia Phonograph Co.* 470

Rescission. See SALES, 4–6.

Performance or breach. See DAMAGES. LOGS AND TIMBER, 3.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 6, 14. NEGLIGENCE, 3. RAILROADS, 15.

CORONER'S VERDICT. See HOMICIDE, 9.

CORPORATIONS.

Incorporation: When existence begins: Power to contract.

1. Under our statutes a corporation comes into being on the filing of its articles with the register of deeds, and from that time may bind itself by contract; and the signers of the articles have authority to manage its affairs. *Sentinel Co. v. A. D. Meiselbach M. W. Co.* 224

2. Evidence stated in the opinion is *held* sufficient to sustain a verdict to the effect that one of the signers of the articles of incorporation was authorized to bind the corporation by contract. *Ibid.*

Capital stock: Sales.

3. The question being whether a contract to sell at a future time "twenty-five shares of the five hundred shares of the capital stock" of a corporation should be construed as being for the sale of a one-twentieth interest only in the corporation, so that after reduction of the outstanding stock to 326 shares the sale was of one twentieth of that number only, the court divided equally. *Zohrlaut v. Mengelberg,* 564

Officers: Suspension by governing body: Trial. See MANDAMUS, 1–3.

4. Where the laws of an assessment insurance society provide that every officer against whom charges have been preferred "shall have a just and impartial trial in accord with the laws and rules of this body," such officer is entitled at least to be advised of the charges and given an opportunity to be heard, even though there are no specific regulations governing the procedure. *State ex rel. Weingart v. Board, etc. G. U. G. Germania,* 516

5. A law of such a society providing that every officer against whom charges have been preferred "shall be suspended from his office until the case is decided," etc., must be given a reasonable construction, and in this case is *held* not to refer to fugitive charges made by an individual on his own responsibility, but only to

charges formulated and presented by some local council or other authoritative body after investigation; since otherwise the society might be without any officers for long periods. *Ibid.*

Foreign corporations. See COMMERCE.

6. Under sec. 1770*b*, Stats. (1898), an unlicensed foreign corporation, when sued upon a contract void in its behalf but enforceable against it, may establish as a defense any facts which will in whole or in part defeat plaintiff's right to recover, but is precluded from obtaining affirmative relief upon any cause of action or counterclaim arising out of the contract. *Rib Falls L. Co. v. Lesh & M. L. Co.* 362

COSTS.

Persons liable.

1. Officers of an assessment insurance society having acted arbitrarily and without jurisdiction in excluding other officers, costs were properly awarded against them personally, upon the granting of a peremptory writ of *mandamus* directing reinstatement of the excluded officers. *State ex rel. Weingart v. Board, etc. G. U. G. Germania,* 516

Security for payment. See COURTS, 1.

Amount, rate, and items.

2. Under the third paragraph of sec. 2921, Stats. (1898), costs may be taxed for notices given under sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307). *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 321

3. Disbursements for sheriff's fees for serving summons may be allowed in the taxation of costs, although not itemized in the bill. *Ibid.*

4. Although the depositions of witnesses had previously been taken, fees for their travel and attendance at the trial were properly allowed and taxed, fees for attendance at the taking of the depositions being disallowed. *Ibid.*

COUNTERCLAIM. See PLEADING, 2.

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COURT AND JURY. See APPEAL, 3. CONTRACTS, 16. GAMING, 3. MASTER AND SERVANT, 23, 29. RAILROADS, 18.

COURTS.

Nature, extent, and exercise of jurisdiction.

1. Prior to the commencement of an action by a nonresident of this state against residents, money was deposited by a person not a party to the action to indemnify sureties for any loss they might sustain by signing an undertaking for costs on behalf of the plaintiff and to indemnify his attorneys for any costs which might be awarded against them. *Held,* that the court in which the action was tried had no jurisdiction to direct the application of any part of such money to a purpose other than that for which it was deposited, without the consent of the depositor, even though the attorneys for all parties to the action stipulated that it be so applied. *Nobarak v. Simmons,* 187

Terms of court.

2. In view of the power granted by sec. 2424, Stats. (Supp. 1906: Laws of 1905, ch. 6), to adjourn one term of court beyond the

beginning of the next for any specific business to be named in the order of adjournment, the provision of sec. 2878, Stats. (Supp. 1906: Laws of 1901, ch. 100), that a motion for a new trial made upon the minutes of the court, if not decided during the same term, shall be taken as overruled, is not unreasonable as denying to the trial judge adequate time to consider and determine the matters involved, but is a valid enactment. *Kurath v. Gove Automobile Co.* 480

3. The parties may waive the provisions of said sec. 2878, and the judge can then decide the motion at any time; but no waiver can be inferred from the mere fact that no objection is made by either party at the time the motion is taken under advisement. *Ibid.*

4. An order cannot be entered after the term, *nunc pro tunc* as of a day of the term at which the motion was made, since to permit that would be to render the statute nugatory. *Ibid.*

5. To keep the motion alive under said sec. 2424, the judge must do so by special order at the close of the term; and he must dispose of it within the time fixed for the adjournment of the term, as the statute makes no provision for a second adjournment. *Ibid.*

6. The provision of that portion of sec. 2424 relating to the second circuit, which declares that any trial, hearing, argument, or assessment commenced at one term but not concluded "shall be continued and proceeded with at the next term in the manner and with like effect as though it had been commenced at that term," relates to some proceeding in which the parties or their attorneys participate, and not to the mere taking under advisement of the decision of a hearing or argument already concluded by the parties. *Ibid.*

District courts. See BONDS, 1, 2, 5, 6.

Justices' courts. See JUSTICES' COURTS.

Municipal courts. See BONDS, 1, 2, 5, 6.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See HOMICIDE.

Former jeopardy. See JURY, 1–3.

Trial: Evidence: Competency and materiality.

1. Testimony that the accused mortgaged his homestead to raise money to defray expenses of his trial is *held*, though irrelevant and immaterial, not to have been prejudicial. *Hedger v. State,* 279

2. Evidence tending to show that police officers acted without authority in searching the premises of the accused and seizing his personal property, is not competent unless some of the property or papers so seized are offered in evidence on the part of the state and objection is made on the ground that the instruments of evidence so offered were procured in this unlawful way. *Ibid.*

Same: Circumstantial evidence.

3. Circumstantial evidence, stated in the opinion, is *held* sufficient to support a verdict of guilty. *Hedger v. State,* 279

CROSS-EXAMINATION. See WITNESSES, 3–5.

CUSTOM AND USAGE. See CONTRACTS, 12. MASTER AND SERVANT, 21.

DAMAGES.

Grounds. See WATERS AND WATERCOURSES, 4, 5.

Liquidated damages. See BROKERS, 4.

Measure of damages. See MASTER AND SERVANT, 3. SALES, 1, 3.

1. "Where two persons have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Foss v. Heineman,* 146
2. The foregoing applies to all ordinary cases, but there is this common exception, in case of there having been special circumstances, mutually known to both parties at the time of making the contract; then the damages resulting from the breach of such contract, which they would reasonably have contemplated, would be the amount of injury ordinarily flowing from a breach of contract under such special circumstances. *Ibid.*
3. The result of the primary rule is, that, in case of a breach of contract to sell and deliver personal property, there being no mutually known special circumstances existing at the time of making the contract, and no special circumstances occurring subsequently to supersede or vary the ordinary rule; the executory vendee is entitled to recover the difference between the purchase price and the fair market value at the agreed place and time for delivery with interest from the time of the breach. *Ibid.*
4. The rule of damages aforesaid for all ordinary contracts, no agreement having been made to the contrary, is written into them by operation of law at the time of making; the result waits upon the breach and application of the rule to the then existing conditions. *Ibid.*
5. The reason of any rule or measure of damages is that, a person wronged by breach of contract should be as fully as practicable, compensated for his loss; so when the rule applicable to a situation does not reasonably so result, it is superseded or varied by some exception, to effect the policy of the law. *Ibid.*
6. If a person agrees to sell and deliver to another at a specified time, price, and place, certain personal property, and such other, thereafter, agrees to resell and deliver at a specified advanced price, to a third person, all such property received from such person, thereby saving himself from any claim for damages because of being unable to deliver to the second vendee the whole thereof, and such person defaults, such other's recoverable damage for the breach is the difference between his agreed purchase and selling price. *Ibid.*
7. The ordinary measure of damages for failure to deliver goods on an executory contract of sale is the difference between the contract price and the market value at the time and place of delivery. *First Nat. Bank v. Snell,* 433
8. The exception to this rule which allows, under some circumstances, a recovery for loss of profits where the vendor knows

Murder. See INSTRUCTIONS TO JURY, 2, 3, 7.

Personal injuries.

8. In an action for personal injuries alleged to have been caused by defendant's negligence, an instruction to the jury relative to the question whether the injuries were the result of an accident, to the effect that an accident cannot happen if reasonable care to prevent it has been taken, is erroneous. *Driscoll v. Allis-Chalmers Co.* 451

9. A further instruction that the burden of proof on the question of accident was upon the defendant, was erroneous because putting upon defendant the burden of proving that he was free from negligence. *Ibid.*

Premeditated design. See INSTRUCTIONS TO JURY, 3.

Reasonable doubt.

10. A charge that the reasonable doubt which entitles an accused person to an acquittal is the doubt of guilt reasonably arising from all the evidence in the case, was not, in view of its context, erroneous as excluding the right to an acquittal by reason of reasonable doubt arising from lack of evidence. *Hedger v. State,* 279

Reputation.

11. A charge that "evidence of good reputation or good character does not constitute a defense," was not erroneous or misleading when considered in connection with the whole charge on that subject, showing in what sense the word "defense" was used and understood. *Hedger v. State,* 279

INSURANCE.

FIRE.

Total loss. See PLEADING, 3.

Forfeiture of policy: Gasoline.

1. Evidence that one of the owners of a factory insured under a policy which by its terms became void if gasoline was kept, allowed, or used on the premises without consent, ordered five gallons of gasoline not intended for use in the factory or to be kept therein, but failed to direct where it should be sent, and that it was delivered at the factory while he was out, but on his return a few minutes later was set outside, where it remained about an hour until he went home at night, when he took it with him, does not show a violation of the policy. *Clute v. Clintonville Mut. Fire Ins. Co.* 638

2. In an action upon such policy, instructions to the jury, stated in the opinion, were not erroneous as applied to the facts. *Ibid.*

3. Although there was some evidence from which the jury might have inferred that the fire was caused by an explosion of gasoline vapor, yet, there being no other evidence of gasoline being brought to or removed from the premises, such instructions were thereby not rendered misleading. *Ibid.*

Subrogation. See RAILROADS, 28.

LIFE.

Forfeiture for nonpayment of premium.

4. In an action on a life insurance policy which had been canceled on the books of the company for nonpayment of a premium, the

evidence is *held* to support a verdict finding that plaintiff was entitled to recover. *Baumann v. Metropolitan Life Ins. Co.* 206

5. After the policy in such a case had been canceled by the company and plaintiff had knowledge thereof, no duty devolved upon her to tender subsequent premiums. *Ibid.*

6. It is immaterial in such a case that the company did not properly or credibly inform plaintiff of the cancellation: it is enough that the information came to her and was true. *Ibid.*

PLATE GLASS.

Agreements affecting right to avoid policy.

7. A provision in an insurance policy that the insurer shall not be liable for any loss or damage resulting directly or indirectly from fire includes all damage of which fire is a proximate cause or a principal cause or a link in the chain of causation or an indirect cause or any cause which the law would recognize as such. *Jones v. Metropolitan Casualty Ins. Co.* 66

8. Where plate glass was insured under a policy containing the above provision and an incendiary fire in a distant building containing dynamite caused the dynamite to explode and the concussion of this explosion broke the glass, the breakage resulted directly or indirectly from the fire and the insurer is not liable. *Ibid.*

INTENT. See GAMING, 2, 3.

INTERSTATE COMMERCE. See COMMERCE.

JEOPARDY. See JURY, 1-3.

JOINDER OF CAUSES OF ACTION. See PLEADING, 1.

JUDICIAL NOTICE. See EVIDENCE, 1.

JUDICIAL POWERS. See CONSTITUTIONAL LAW, 1. JUSTICES' COURTS, 1. RAILROADS, 6.

JURISDICTION. See APPEAL, 1. COURTS, 1. INJUNCTION, 3, 4. JUSTICES' COURTS, 1. RAILROADS, 6.

JURY.

Discharging jury.

1. Where it is discovered, after the jury is accepted and the trial in progress, that one of the jurors is not impartial, has formed and expressed an opinion in the case, and has testified falsely on the *voir dire*, the court may discharge the jury, impanel another, and begin the trial anew; and the accused will not thereby have been twice put in jeopardy. *Hedger v. State,* 279

2. This power of the court rests upon the ground of necessity, like the case of sickness or death of a juror or that of the presiding judge. It is absolutely necessary to discharge the first jury under such circumstances and begin anew in order to have a trial of the cause which is a trial and not a farce. *Ibid.*

3. This power of the court cannot be exercised for its own convenience or in discretion, and can be exercised only in cases in which the law recognizes and points out the necessity for such action. *Ibid.*

Challenges.

4. Sustaining the challenge of the prosecution to a juror is a matter largely within the discretion of the trial court, and its finding that the juror is not impartial is conclusive upon the appellate court, if there is evidence to sustain it. *Hedger v. State,* 279

JUSTICES' COURTS.

Jurisdiction: Unconstitutional limitation thereof.

1. Ch. 544, Laws of 1909, is *held* invalid as a violation or attempted evasion of secs. 2, 15, art. VII, Const. *State ex rel. Burke v. Hinkel,* 444
2. The void parts of such act embrace the dominant purposes thereof and, being the inducements to the enactment of the other portions, the whole act is void. *Ibid.*

Law of the Case. See Appeal, 17.

Legislative Powers. See Constitutional Law. Courts, 2. Elections, 1–17. Justices' Courts, 1. Railroads, 2.

Licensee. See Railroads, 11–15.

Liens. See Mechanics' Liens.

Life Insurance. See Insurance, 4–6.

LOGS AND TIMBER.

1. A contract for the sale and delivery of all standing timber on certain lands at specified prices is *held* not entire but apportionable, and delivery of all the logs not a condition precedent to the vendors' right to enforce payment for those actually delivered. *German American Bank v. Webster Mfg. Co.* 314
2. The contract not requiring all the logs to be delivered by May 1st in the second season, the vendors had a reasonable time after that date to deliver the logs not theretofore logged. *Ibid.*
3. Breaches of the contract by the vendee in failing and refusing to make the stipulated payments and settlement gave the vendors a right to treat the contract as terminated and to dispose of the undelivered logs and uncut timber in some other way. *Ibid.*

MANDAMUS.

Grounds. See Appeal, 1. Mandamus, 4, 5.

1. Where the governing body of an assessment insurance corporation was large and met but once in two years and in the meantime the entire management was vested in the officers, and some of such officers arbitrarily and unlawfully excluded others from performing their duties, the latter were entitled to relief by *mandamus* to redress the wrong done not only to themselves but to the members at large of the corporation, although the financial interest of the excluded officers was so small and uncertain as not, in itself, to furnish a sufficient basis for such relief. *State ex rel. Weingart v. Board, etc. G. U. G. Germania,* 516
2. The general rule is that in such a case all remedies provided by the rules of the corporation, by appeal or otherwise, should be exhausted before resort is had to the courts; but such rule is not applicable where the proceedings for removal of the officers are void or where an appeal would be wholly fruitless. *Ibid.*
3. *Mandamus,* not *certiorari,* is the proper remedy in such a case. *Ibid.*

Subjects and purposes of relief: Acts and proceedings of municipalities.

4. A city ordinance requiring a street railway company to sprinkle the streets between and for a certain distance on either side of its tracks imposes a duty which is public in its nature, the object being to preserve the public health and promote its comfort, even though the city might, perhaps, have authority to charge the whole or a part of the expense of sprinkling to abutting owners. Such a duty may properly be enforced by *mandamus*. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 386

5. *Mandamus* will lie to enforce the performance of a continuous legal duty. *Ibid.*

6. Where a street railway company has disregarded for five years a city ordinance requiring it to sprinkle streets and in a *mandamus* proceeding contests the right of the city to require it to do any sprinkling at any time in the future, it cannot be held that the proceeding presents only a moot question, although it does not appear that the company does not intend to do the sprinkling in the future. *Ibid.*

7. A city has such an interest in the sprinkling of its streets, both from its interest in the public health and from the pecuniary saving to it of the expense of sprinkling the street crossings, as makes it a proper relator in such a *mandamus* proceeding, notwithstanding abutting property owners may also be benefited by being relieved of a burden which might otherwise be imposed on them. *Ibid.*

MANDATORY STATUTES. See MUNICIPAL CORPORATIONS, 8.

MANUAL TRAINING SCHOOLS. See MUNICIPAL CORPORATIONS, 1, 2, 4, 6, 34, 36, 38. TRUSTS AND TRUSTEES, 2. WILLS, 2.

MASTER AND SERVANT.

The relation. See CONTRACTS, 1, 2. SUNDAY, 2.

Same: Performance of services.

1. One who contracts to render services requiring skill and diligence impliedly undertakes that he possesses the requisite skill and that he will serve faithfully and diligently, but there is no implied agreement that he will commit no errors. *Noble v. Libby,* 632

2. Where there has been no fraud, actual or constructive, and where no money of the employer of any ascertainable amount has come into the hands of the employee, there is no legal liability of the latter for deceit or for money had and received, although there may have been a breach of the contract of service in that the employee did not serve faithfully or with the requisite skill and diligence. *Ibid.*

3. Where defendant was employed by plaintiff to aid in locating certain valuable timber lands and entering them by proper description under the Stone and Timber Act (20 U. S. Stats. at Large, ch. 151, p. 89), and through defendant's failure to exercise the requisite skill and diligence plaintiff failed to enter the

lands intended, plaintiff is not necessarily entitled to recover the whole amount which he paid out to a third person for informing him of the existence of said lands and for pointing them out. *Ibid.*

Master's liability for injuries to servant: Tools, machinery, and appliances: Unguarded gearings.

4. In an action for death of an employee who was caught in a bevel gearing located under and operating a live-roller table in defendant's sawmill, the jury was warranted by the evidence in finding that the gearing had not been safely guarded. *West v. Bayfield Mill Co.* 106

5. Under sec. 1636*jj*, Stats. (Supp. 1906: Laws of 1905, ch. 303), an employee does not assume the risk of an unguarded gearing by continuing to work around the same after knowing of its existence; and this rule applies to a case where the guard is temporarily displaced without the master's knowledge, if such removal was due to its being insecurely fastened in the first instance. *Ibid.*

6. Although the board constituting the guard for the gearing had, to the knowledge of the deceased, become displaced about half an hour before the accident, it not appearing that he had appliances at hand to fasten it back, and there being evidence tending to show that he was occupied with his work all the time and had no authority to shut down the mill, which might have resulted from his leaving his place, he was not guilty of contributory negligence as a matter of law in failing to replace the guard or to notify the master that it was off, but the question was for the jury. *Blahnik v. Central C. Co.* 142 Wis. 167, distinguished. *Ibid.*

7. Sec. 1636*j*, Stats. (1898), requiring that dangerous shafting and gearing be securely guarded, does not impose on the employer the duty to insure an employee's safety against all possibility of injury, as is implied in an instruction that employees "should be secure against danger of violence while performing their work." *Ibid.*

8. The employer discharges his duty under the statute when (1) he uses ordinary care and prudence in determining whether the gearing or shafting is so situated as to be dangerous to employees while performing their duties, and decides the question as ordinarily careful and prudent employers under like circumstances, in the honest exercise of their judgment, would decide it; and (2) when, the shafting or gearing being such as is required to be guarded, he provides as effective a guard as ordinarily careful and prudent employers, under like circumstances, would and do deem it their duty to furnish. *Ibid.*

9. The one exception to the last proposition is that if the guard as ordinarily furnished be obviously dangerous it will not be deemed sufficient. *Ibid.*

10. Unless the employer has reasonable ground to believe that an accident might happen to the employee while performing his work, he is not at fault in failing to provide a guard; and in providing one where required the measure of his duty is ordinary care. *Ibid.*

11. Where the facts are such that the jury might have found either way upon the question whether gearing was securely guarded

within the meaning of the statute, an instruction which in effect makes the employer an insurer of the safety of his employees is clearly prejudicial and ground for reversal, even under ch. 192, Laws of 1909 (sec. 3072*m*, Stats.). *Ibid.*

12. There being no claim in this case that it was not feasible to guard the gearing in question, evidence that a sheet-iron covering might have been used instead of the hemlock board, and that such guard could have been fastened on the roller bed and would not have interfered with the use of the machine, was incompetent. [Whether the admission of such evidence was a material error, not decided.] *Ibid.*

13. Neither the statute relating to the guarding of machinery so located as to be dangerous to employees in the discharge of their duties, nor the common-law rule on the subject, applies to a situation where, in order to come in contact with such dangerous machinery, the employee must necessarily go out of the usual way and out of any way which he would reasonably be expected to take. *Houg v. Girard Lumber Co.* 337

14. An employee in a sawmill, injured by having his foot caught between a sprocket wheel and a chain, under the evidence, stated in the opinion, is *held*, as a matter of law, to be guilty of contributory negligence. *Ibid.*

15. In such case it was no excuse for the injured employee that in going up the stairway he would have to pass close to a broken sawdust spout from which sawdust and other materials were being ejected, where such break was easily repaired and he had been accustomed to make similar repairs in the past. *Ibid.*

16. The defect complained of being an unguarded set-screw projecting from a collar on the shaft of the sprocket wheel a few inches away from the wheel, and plaintiff's own testimony showing that his foot was drawn in between the chain and the wheel until the wheel stopped because of the obstruction, testimony to the effect that the set-screw continued to revolve and cut into the flesh of his foot was incredible, and a finding by the jury that the injury was caused by such set-screw was unsupported by the evidence. *Ibid.*

Same: Safe places to work. See MASTER AND SERVANT, 35. NEGLIGENCE, 2. TRIAL, 2.

17. The duty of the master to furnish a reasonably safe working place for his servants being absolute, if he delegates such duty to another the negligence of the latter in that regard will be imputed to the master. *Driscoll v. Allis-Chalmers Co.* 451

Same: Building operations.

18. Defendant was building additions to its plant, carrying on the work through its different departments which employed a large number of men. Plaintiff, of the steamfitters' department, was working at a pipe in a trench over which the carpenters' department had constructed a plank runway for the use of the men in the different departments in carrying materials. While passing over this runway, a helper in the equipment department dropped a heavy wooden block which struck and injured plaintiff. *Held*, that defendant could not escape liability on the ground that the acts and conditions causing the injury were mere working details of the building operations and that the

negligence of the helper who dropped the block and the failure of plaintiff's foreman to make the working place safe by preventing use of the runway were negligence of plaintiff's fellow-servants, for which the master was not liable. *Driscoll v. Allis-Chalmers Co.* 451

19. Evidence that it was customary for the foremen to arrange for protection of the employees; that plaintiff's foreman assumed the right and had at least apparent authority to prevent use of the runway while plaintiff was at work in the trench; and that plaintiff relied upon his promise and apparent authority and was reasonably warranted in so doing and did not know that the runway was in fact being used, was sufficient to support a finding by the jury that plaintiff did not assume the risk. *Ibid.*

20. If plaintiff's working place was unsafe because of the runway and the employee carrying the block dropped it because of the unsafe condition of the runway, defendant is chargeable with the result, even though no negligence was shown on the part of such employee except in going over the runway with the block. *Ibid.*

21. Evidence as to other instances of alleged danger in the work plaintiff had been ordered to do, to which he had objected and which had been remedied before the work was done, was admissible as tending to show the custom of the foremen to arrange with one another to guard against dangers and for the purpose of showing that plaintiff was justified in relying upon a promise of his foreman as to nonuse of the runway. *Ibid.*

Same: Latent dangers.

22. If the master knows or by the exercise of ordinary care ought to know of latent dangers attendant upon the usual conduct of his business, and the servant does not and cannot by the exercise of ordinary care know thereof, it is the master's duty to warn the servant, and if he fails to do so the servant does not assume the risk by remaining in the employment. *Ruck v. Milwaukee Brewery Co.* 404

23. In an action for an injury caused by the explosion of a bottle of beer while standing on a tray after having been immersed in hot water in the process of pasteurizing, the evidence being conflicting, the questions whether bottles had previously exploded under similar circumstances, and whether defendant knew or in the exercise of ordinary care ought to have known thereof, were for the jury. *Ibid.*

24. Although plaintiff had been employed for several weeks in the same room, as sweeper and general helper, but never before in assisting to fill the tray, his testimony that he did not know that bottles exploded either when handled or when standing still, was not so incredible that no weight should be attached thereto. *Ibid.*

Same: Duty of inspection.

25. Where a master buys of reputable dealers material of a standard make to be used by a servant in the course of an employment which renders it more likely that the servant will seasonably discover defects than that the master could do so by any reasonable inspection, no duty devolves upon the master to inspect such material before turning it over to the servant for use. *Gibson v. Milwaukee L., H. & T. Co.* 140

26. Where in such a case no inspection which could be required of the master would have been likely to disclose any defect in the material, it cannot be held that the master's failure to inspect was the proximate cause of an injury to the servant resulting from such a defect. *Ibid.*

27. Where an inspection would in all probability not have disclosed any defect in the material, and it is wholly a matter of conjecture whether the injury to the servant was or was not the result of any defect, no actionable negligence of the master is shown. *Ibid.*

Same: Warning and instructing servant. See MASTER AND SERVANT, 22, 23. TRIAL, 12.

28. A danger in the operation of machinery which may be held as matter of law to be so open and obvious to an adult employee that there was no duty to warn him thereof may be held otherwise under the same circumstances if the employee is an infant of tender years, and it may then properly be a question for the jury whether the infant employee knew and appreciated, or ought to have known and appreciated, not only the existence of the danger but the extent and character of the risk to which he was subjected thereby. *Keena v. American Box Toe Co.* 231

29. Thus, in this case, it was properly a question for the jury whether a girl fourteen years old should, without warning or instruction, have known and appreciated the extent of the risk to which she was subjected. *Ibid.*

30. In an action for injuries to an infant employee whose fingers were caught between the rollers of a machine at which she was working, there being no claim that the machine was defective or that the employer was required by sec. 1636*j*, Stats. (1898), to guard such rollers, and the only negligence charged being the failure to warn or instruct her of the danger, it was error to submit to the jury the question whether the machine, in the condition in which it was at the time, was dangerous to the defendant's employees when engaged in their ordinary duties, and in connection with such question to read to the jury said sec. 1636*j* and instruct them that it was in force at the time of the accident. *Ibid.*

31. Such error must be held to have been prejudicial where it is impossible from the verdict to tell whether the jury based its finding that defendant was negligent upon the failure to give warning or upon the unguarded condition of the machine. *Ibid.*

32. It was also error in such a case to allow proof that at some previous time there had been a guard of some kind on the machine, which had been taken off before the accident. *Ibid.*

33. An admonition to plaintiff by the foreman to be careful and not let bottles strike together was not a sufficient warning of the danger incident to the explosion of bottles. *Ruck v. Milwaukee Brewery Co.* 404

34. Where there are many fellow-servants, some working in one department or feature of an industry and some in others quite independent thereof, and the situation is such that the work in one department is likely from time to time to create peril of personal injury to those engaged in some other part of the work unless precautions according to some prescribed method are ex-

ercised to avoid it, ordinary care requires the making and efficient promulgation of reasonably sufficient rules to that end. *Pern v. Wussow*; 489

35. But where there is a single small crew of men working with each other at a single task, and one of them is injured by reason of a danger incident to constantly changing conditions created by the men themselves, which all appreciate and understand they are expected to avoid by individual vigilance, the foregoing rule and the general rule respecting the duty of the master to furnish a safe working place have no application. *Ibid.*

Same: Vice-principal. See MASTER AND SERVANT, 17.

Same: Fellow-servant. See MASTER AND SERVANT, 18–21, 34, 35.

Same: Assumption of risk. See MASTER AND SERVANT, 5, 19, 22, 28, 29.

Same: Contributory negligence. See MASTER AND SERVANT, 6, 14. RAILROADS, 16–22.

MAXIMS.
Expressio unius est exclusio alterius, 14.
Res judicata pro veritate accipitur, 678.
Salus populi suprema lex, 378.

MEASURE OF DAMAGES. See DAMAGES. MASTER AND SERVANT, 3. SALES, 1, 3.

MECHANICS' LIENS.

Subcontractor's lien: Foreclosure.

1. A notice of subcontractor's lien sufficiently complies with sec. 3315, Stats. (1898), in respect to stating the *amount due* where it states the total amount of the bill and the amount paid thereon, the balance due being necessarily inferable from the facts stated. *Chandler L. Co. v. Fehlau*, 137 Wis. 204, distinguished. *W. H. Pipkorn Co. v. Evangelical L. St. Jacobi Society*, 501

2. A notice of subcontractor's lien directed to "St. Jacobi Congregation," etc., but properly served upon the real owner, "Evangelical Lutheran St. Jacobi Society," etc., is sufficient, the statute (sec. 3315, Stats. 1898) not requiring that the notice be *directed* to the owner, but merely that it shall be *given* to the owner and shall contain certain particulars. *Ibid.*

3. Where the complaint of a subcontractor alleges that a claim for a lien was duly filed which contained the name of the person against whom the demand was claimed, a finding of that fact by the trial court will not be disturbed on appeal where the record shows that the claim for lien filed in the clerk's office was received in evidence without objection and the certificate to the bill of exceptions shows the loss of some of the exhibits, although the owner's name was not correctly given in the copy of the claim annexed to the complaint and it does not appear that any amendment was asked for or allowed. *Ibid.*

MILK. See MUNICIPAL CORPORATIONS, 21–27.

MILL-DAMS. See WATERS AND WATERCOURSES.

MINORS. See MASTER AND SERVANT, 28–31. RAILROADS, 11, 13, 15. TAXATION, 1. TRIAL, 12.

MONEY HAD AND RECEIVED. See MASTER AND SERVANT, 2.

MOOT QUESTIONS. See APPEAL, 1. MANDAMUS, 6.

MOTIVE. See INSTRUCTIONS TO JURY, 7.

MUNICIPAL CORPORATIONS.

Governmental powers and functions: Maintenance of schools, etc.: Acceptance of gifts.

1. A will made for the purpose of carrying out the wish of the deceased husband of testatrix to found an institution wherein sound business principles might be taught and where pupils might be fitted for manufacturing and business careers and domestic duties, gave property for the purpose of founding and perpetually maintaining "a manual training school" the object of which should be to teach cooking, sewing, and domestic economy to girls, and "all things of mechanical and other technical work to young men, and to teach to both girls and boys such things as are usually taught in modern manual training schools, and . . . such things as the progress of time develops ought to be taught in a manual training school." *Held*, that the school so provided for was such a manual training school as the city of Oshkosh had a right to maintain at public expense, and that the city might, therefore, accept the donation and comply with a condition thereof requiring the raising of an additional sum for the same purpose. *Maxcy v. Oshkosh*, 238

2. Read with the context, the words "all things of mechanical or other technical work" refer to such things as were being or might properly be taught in a modern manual training school maintained at public expense; and no particular significance should be attached to the reference to the deceased husband's wish to found an "institution" of learning. *Ibid.*

3. A condition of a testamentary gift to found and maintain a school, that it shall bear the name of the deceased husband of testatrix, may lawfully be complied with by a city. *Ibid.*

4. A testamentary gift to found and maintain a manual training school in a city was made upon condition that an additional $50,000 for that purpose be raised by or for the city. The will directed that the whole fund, except so much as might be necessary to purchase a site and erect suitable buildings, and the income thereof should be a perpetual fund to be used to provide, support, and maintain such school. The testatrix intended that the school should be a memorial to her deceased husband, and stipulated that a substantial building be constructed and equipped with modern appliances, placing no restriction upon the amount which should be expended therefor. *Held*, that by raising the $50,000 and expending the whole thereof for a building and equipment for the school the city would substantially comply with the requirements of the will, and thereby obviate the objection that the city had no power to raise a fund to be invested in perpetuity for such a purpose. *Ibid.*

5. Where a gift to a city in aid of some municipal purpose is made on condition that the city itself make a contribution for that purpose, the city may do so, provided it might lawfully make such expenditure had no gift been made. *Ibid.*

6. The action of a city in raising and appropriating money to build a manual training school was not void, although induced by a conditional testamentary gift for such a school, where the testatrix was actuated by no ulterior motive in making the gift and neither she nor her family could reap any material benefit there from. *Ibid.*

Proceedings of common council: Ordinances. See MANDAMUS, 4, 6, 7. MUNICIPAL CORPORATIONS, 8, 9, 14–17, 21–30.

7. Under sec. 1862, Stats. (1898), providing that street railway companies shall be "subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe," it is not necessary that the "regulations" referred to be passed when the right to use the streets is granted. The only limitation is that the regulations must be reasonable. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 386

Same: Franchises. See MUNICIPAL CORPORATIONS, 14–20.

Same: Conditions precedent to passage.

8. A provision of a city charter requiring an "aye" and "no" vote to be taken on all ordinances or resolutions for the appropriation or disbursement of money, or creating any liability or charge against the city, and that such vote be entered at length upon the journal, is mandatory, and in a case coming within its terms it is not sufficient that the facts can be ascertained from the clerk's original minutes. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 386

9. The word "liability" as used in such city charter means something more than a mere undertaking on the part of the city which may involve no expense to it at all, such as a provision that a city owning and operating its own waterworks shall furnish water free for street sprinkling, and an ordinance containing such an undertaking does not require an "aye" and "no" vote. *Ibid.*

Same: Amendment and repeal.

10. An ordinance of the city of Milwaukee, adopted in 1902, requiring the sprinkling of streets by a street railway company, was included in a general revision of the ordinances passed in 1906, but the rules regulating such sprinkling, adopted under the ordinance by the board of public works and approved by the common council, were not included in such revision. It was, however, expressly provided therein that all ordinances prescribing any rules, regulations, or restrictions upon street railway companies were not repealed. *Held*, that this provision was sufficiently broad to save the rules if they became part of the ordinance, and, if they did not, then obviously they were not repealed. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 386

11. An ordinance of the city of Milwaukee passed in 1902, requiring the sprinkling of streets by a street railway company, was not repealed by ch. 501, Laws of 1909. The authority conferred by the latter act was only cumulative and supplementary to existing rights. *Ibid.*

12. Repeals by implication are not favored, and where there are two affirmative statutes on the same subject one will not repeal the other if both can stand together. *Ibid.*

13. An ordinance providing permanently for the sprinkling of streets by a street railway company was not repealed by a mere resolution of the common council, passed pursuant to ch. 501, Laws of 1909, during the pendency of an action against the street railway company to enforce performance of such duty, directing

the board of public works to sprinkle such streets for a period of three and one-half months and charge the expense to the abutting owners. *Ibid.*

Officers: Disability to contract with municipality: Validity of contract: Estoppel.

14. The contract provisions relating to the furnishing of water for city purposes and the payment of hydrant rentals by the city, contained in a franchise granted to a water company, are within the contemplation of a charter provision prohibiting any member of the common council from being a party to or interested in any job or contract with the city and declaring that any contract in which such member may be so interested shall be null and void. *Antigo Water Co. v. Antigo,* 156

15. The fact that a member of the common council is a stockholder in a corporation to which such a franchise is granted makes him interested in a contract with the city within the meaning of the said charter provision, and renders null and void the entire ordinance embodying the terms of the franchise and contract. *Ibid.*

16. Where a waterworks franchise was granted to a private individual and assigned by him to a corporation and, after the construction of the plant and its failure to meet the test prescribed in the franchise, a new ordinance was passed purporting to be an amendment to the previous one, providing for payment of hydrant rentals, and omitting a condition of the original ordinance relieving the city from the obligation for such rentals if the plant failed to meet the requirements of subsequent tests called for by the city, and at the time of the adoption of such amending ordinance a member of the council was a stockholder in the corporation, this fact rendered the latter ordinance void and left the former in full force. *Ibid.*

17. In such case the city was not estopped from asserting the invalidity of the amending ordinance because it insisted on the agreements embodied therein before it would accept the waterworks plant, or because for over seventeen years it accepted and paid for the public services therein provided for, or because it always claimed to act under it in all matters pertaining to the maintenance and extension of the system and thereby induced the water company to maintain and operate its plant pursuant thereto, since (1) most of the acts relied on to work an estoppel were equally referable to the original ordinance, and the additional service required was slight, and (2) because the water company, equally with the city, must be presumed to know the law and hence to know that such amending ordinance was void. *Ibid.*

Property: Schools. See MUNICIPAL CORPORATIONS, 1–6. SCHOOLS AND SCHOOL DISTRICTS, 1. TRUSTS AND TRUSTEES, 2, 8. WILLS, 2.

Contracts: Hydrant rentals: Conditions precedent. See MUNICIPAL CORPORATIONS, 14–17.

18. Where a waterworks franchise authorized the city from time to time to demand tests of the efficiency of the plant, and provided that if the test could not be satisfactorily made owing to a deficiency in the system the city should be free from obligation to pay hydrant rentals after ten days until such time as a test could be successfully made, the water company was bound, as a

condition precedent to its right to recover rentals accruing later than ten days after an unsuccessful test, to show that the rentals were earned by the system complying with the requirements as to efficiency, even though it continued to furnish and the city to use water for public purposes; and no question of forfeiture of rentals earned is involved in such a case. *Antigo Water Co. v. Antigo*, 156

19. In the absence of any agreement to the contrary it must be held that the franchise provision contemplated that the tests should be made under ordinary operating conditions of the plant; and, there being nothing in the evidence to show that the operating conditions were not the usual ones, the water company could not excuse failure by a claim that there must have been an unusual discharge through the service connections which it could not reasonably have anticipated. *Ibid.*

20. Where plaintiff set up a claim for hydrant rentals under the contract provisions of the ordinance, and defendant denied liability, alleging that the services were not rendered as provided in the contract, the burden of proof was on the plaintiff throughout the trial to establish its claim by preponderance of the evidence, and defendant was not bound to show wherein the system was deficient in order to relieve itself from liability. *Ibid.*

Police power and regulation: Milk.

21. Where there are conflicting scientific beliefs or theories concerning the danger of infection from the use of milk from cows afflicted with tuberculosis and concerning the efficacy of the tuberculin test for the purpose of determining the presence of tuberculosis in cows, the common council of a city authorized by statute to legislate for the protection of the public health may determine upon which of these theories it will base its police regulations, and unless such determination is clearly and manifestly wrong the courts will not interfere with the ordinance on the ground that the scientific theory upon which it is based is incorrect or unsound. *Adams v. Milwaukee*, 371

22. Statutes and decisions and evidence referred to go to show a widespread popular recognition of the danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test. *Ibid.*

23. An ordinance which prescribes different police regulations relative to the sale and distribution of milk shipped into the city from those regulations relative to milk produced from cows within the city, is valid. *Ibid.*

24. In order to uphold an ordinance which requires for its enforcement destruction of property, a case must be presented in which the usual sanction of fine or imprisonment or the abatement of nuisance by suit in court, or indeed any milder or slower mode of dealing with the offender than destruction of his property, would be inadequate to preserve public health or safety. *Ibid.*

25. In all ordinary cases of destruction of property under such authority the property owner may resort to the courts and recover his damages by proving that the property which was destroyed as a nuisance or as dangerous to the public health or safety was not such in fact. *Ibid.*

26. Where large quantities of milk are daily shipped into a city by persons residing outside of the jurisdiction of the city officers,

the liability of the milk to rapid decomposition, the futility of proceeding by fine and imprisonment against the shipper, carrier, or consignee, and the necessity for effectually preventing any of such milk being used, all establish a situation in which it may be said that the common council had the right to decide that destruction of the milk was the only available or efficient penalty for the enforcement of the ordinance. *Ibid.*

27. There is a distinction relative to the power to destroy property in the abatement of existing nuisances and in the abatement of nuisances created by wilfully placing property in the forbidden place or condition after the enactment of an ordinance and in defiance of it. Self-inflicted damage is not recoverable. The open judicial inquiry in such case is, Was the damage self-inflicted? *Ibid.*

Same: Sprinkling of streets. See MANDAMUS, 4, 6, 7.

28. Only in a case which is clear beyond a reasonable doubt will the courts declare void an ordinance adopted under the police power in the interest of the public health. *State ex rel. Milwaukee v Milwaukee E. R. & L. Co.* 386

29. An ordinance requiring a street railway company to sprinkle the parts of the streets immediately adjacent to their tracks is not unreasonable, provided the power is exercised in a proper manner. *Ibid.*

30. Such an ordinance is not unreasonable because it requires the sprinkling to be done in such a manner as will keep the surface continually moist and prevent the dust from arising at all times each day when the work is done, "but not in such a manner as to create mud or pools of water." Reasonably interpreted, this only means that the company must exercise ordinary care and caution in doing the work, not that the street must be entirely free from mud or from small pools of water. *Ibid.*

31. Among the different users of the public streets, street railways are in a class by themselves, and an ordinance which requires them to sprinkle parts of the streets is not void as being discriminatory, although no such duty is imposed upon other users. *Ibid.*

Use and regulation of public places: Streets: Extent.

32. The recorded plat of a village shows that by the survey it embraced all the land lying between certain definite lines and the shore of a lake and that the shore line formed a part of the boundary of the land platted. The location of "Park Avenue" is indicated on one side by the lines of the blocks abutting thereon and on the other side by the irregular shore line of the lake, except that a small portion of the avenue lies between two blocks and is there marked as sixty feet wide. The width of the other portions of the avenue is not indicated by figures on the plat, but the width of the other streets is so marked. The name of the avenue is printed nearly midway between the shore line and the block lines, and not, as in the case of other streets, in the center of a street sixty feet wide. The situation and location of the lots and blocks fronting on the avenue evinces a plan to provide for a wide avenue along the lake shore for the use of the public, to afford access to the water, and for the parking of the lake shore; and the unrestricted and open use of the whole place by the public and the conduct of the dedicator after

the platting harmonize with that idea. The only evidence to the contrary is a quitclaim deed given by the dedicator about sixteen years after the land was platted, purporting to include unplatted lands lying between the avenue and the lake, but such deed recited that "the grantor makes no representations whatever as to the title to the lands herein described." *Held*, that except as to the small portion above mentioned Park Avenue extends to the water's edge and embraces all land between the shore line and the opposite blocks. *Woodlock v. Minocqua*, 86

Same: Sprinkling streets. See MANDAMUS, 4, 6, 7. MUNICIPAL CORPORATIONS, 28–31.

Fiscal management: Power to incur indebtedness.

33. Where property is given to a city in trust to found and maintain an educational institution, upon condition that a further sum for that purpose be raised by or for the city, the city has no right to bond itself for such purpose unless it is authorized by law to maintain such a school or institution as a part of its general system of education. *Maxcy v. Oshkosh*, 238

34. Under its charter (Laws of 1891, ch. 59, subch. XI, sec. 4) the city of Oshkosh has power to erect one or more buildings to be used exclusively for manual training and may maintain such schools for the benefit of all pupils of school age and all other persons whom it may have the right to admit to any of its public schools. *Ibid.*

Same: Bonds.

35. The city charter of Oshkosh (sec. 6, subch. XI, ch. 59, Laws of 1891) does not make the adoption of plans a condition precedent to the right of the city to vote bonds to raise money for the erection of a school building. *Maxcy v. Oshkosh*, 238

36. Although the city charter (sec. 7, subch. XI, ch. 59, Laws of 1891) required the city treasurer to keep all moneys raised for school purposes as a separate fund and disburse the same only on the orders of the board of education, a formal tender of money raised by the sale of bonds to erect a building for a manual training school, made by the city to the trustees of a testamentary gift for such school conditioned upon the city raising the sum tendered, did not vitiate the bonds or create an unlawful diversion of the money. *Ibid.*

37. Sec. 926—11, Stats. (Supp. 1906: Laws of 1903, chs. 228, 428), does not require an exact statement of the amount which is to be levied annually; and an ordinance providing for the levy of a tax to pay interest on a certain amount of bonds at a rate "not to exceed four per cent. per annum" is sufficiently definite and certain where the bonds issued in fact bear four per cent. *Ibid.*

38. Bonds headed "Manual Training School Bond of the City of Oshkosh" and reciting in the body thereof that they are issued "for the purpose of erecting, constructing, and maintaining a manual training school building in and for the city," sufficiently comply with the requirement of said sec. 926—11 that such bonds shall "bear an appropriate name indicating the purpose of their issue." *Ibid.*

39. Under the authority given by said sec. 926—11 to issue bonds "for the erection, construction, and *completion* of school buildings,"

bonds may be issued to build and *equip* a school building; such a building not being *complete*, within the meaning of the statute, until equipped. *Ibid.*

MUNICIPAL COURTS. See BONDS, 1, 2, 5, 6.

MURDER. See HOMICIDE. INSTRUCTIONS TO JURY, 2, 3, 7.

NAMES. See MECHANICS' LIENS, 2.

NEGLIGENCE.

Acts and omissions causing negligence. See AUTOMOBILES, 1. MASTER AND SERVANT, 4–35. RAILROADS, 12–15, 23–28.

Proximate cause. See MASTER AND SERVANT, 26. RAILROADS, 20, 26.

1. A contractual negation of liability for damage caused directly or indirectly by a specified element presents a different question from that presented in an investigation concerning the legal or proximate cause of an injury. *Jones v. Metropolitan Casualty Ins. Co.* 66

2. Findings in the special verdict that defendant's failure to provide plaintiff with a safe working place was the proximate cause of the injury, and also that negligence of the employee who dropped the block was such cause, constituted a sufficient finding of proximate cause, defendant being chargeable with the consequences of both negligent acts and the injury being the natural and probable result of their concurrence. *Driscoll v. Allis-Chalmers Co.* 451

Ordinary negligence. See RAILROADS, 16.

Comparative negligence. See RAILROADS, 16–22.

Contributory negligence. See MASTER AND SERVANT, 6, 14. RAILROADS, 15.

3. Contributory negligence is a matter of defense and the burden is upon the defendant to establish it by affirmative evidence unless it is shown by the plaintiff's proofs. *West v. Bayfield Mill Co.* 106

Actions: Evidence.

4. No amount of conjecture or weight of mere possibility can support a verdict in plaintiff's favor in an action for personal injury, but reasonable certainty as to the cause of the injury must be established to warrant a recovery. *Houg v. Girard Lumber Co.* 337

Same: Instructions to jury. See INSTRUCTIONS TO JURY, 8, 9.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS. See EVIDENCE, 1. SUNDAY, 1.

NEW TRIAL.

Proceedings to procure new trial. See COURTS, 2–6.

Grounds: Newly discovered evidence.

1. Refusal to grant a new trial on the ground of newly discovered evidence was not error where such evidence was cumulative or corroborative of evidence given on the trial and was much weakened by contradictory statements or admissions alleged to have been made by the proposed witnesses and otherwise. *Dickson v. Bills,* 171

2. On a motion for a new trial on the ground of newly discovered evidence the motion may be denied if the trial court is convinced upon proper evidence that there is no reasonable probability that another jury, having before it all the former evidence together with the newly discovered evidence, would come to a different conclusion from that arrived at by the former jury. *Hedger v. State,* 279

3. In a case where the newly discovered evidence consisted of the testimony of a witness on a relevant and material point, but the witness was examined and cross-examined and therein his sanity, his veracity, and his general character were impeached by himself and others, the court may, upon the ground stated, deny the motion for a new trial. *Ibid.*

NONSUIT. See DISMISSAL AND NONSUIT.

NOTICE.
Of injury. See RAILROADS, 27, 28.
Of loss. See COSTS, 2.
Of subcontractor's lien. See MECHANICS' LIENS, 1, 2.
To repair. See RAILROADS, 14.

NUISANCES. See MUNICIPAL CORPORATIONS, 23–27.

OFFICERS. See BONDS. CORPORATIONS, 4, 5. COSTS, 1. MANDAMUS, 1–3. MUNICIPAL CORPORATIONS, 14–17. SCHOOLS AND SCHOOL DISTRICTS, 2–4.

OPINION EVIDENCE. See EVIDENCE, 2. INSTRUCTIONS TO JURY, 6. TRIAL, 2. WITNESSES, 4.

OPTIONS. See BROKERS, 1–4.

ORDINANCES. See MANDAMUS, 4, 6, 7. MUNICIPAL CORPORATIONS, 8–11, 13, 14, 16, 17, 21–24, 27–30.

ORDINARY NEGLIGENCE. See RAILROADS, 16.

ORPHANS. See WILLS, 3–7.

PARTIES. See BONDS, 5. MANDAMUS, 7. RAILROADS, 7–9.

PAYMENT.

Application of payments. See BILLS AND NOTES. COMPROMISE AND SETTLEMENT.

The general rule that, where a debtor makes a voluntary payment to a creditor who has several claims against him and fails to direct where such payment shall be applied, the creditor has a right to apply the same on any of the claims, governs a payment made by a contractor to a materialman who had furnished materials to him on several different jobs, as against a property owner from whom the contractor had received the money so paid. *W. H. Pipkorn Co. v. Evangelical L. St. Jacobi Soc.* 501

PENALTIES. See MUNICIPAL CORPORATIONS, 24–27.

PERPETUITIES. See TRUSTS AND TRUSTEES, 7, 8.

PERSONAL INJURIES. See AUTOMOBILES. INSTRUCTIONS TO JURY, 8. MASTER AND SERVANT, 4–35. NEGLIGENCE, 2–4. RAILROADS, 11–22. TRIAL, 3, 12.

PLATE GLASS INSURANCE. See INSURANCE, 7, 8.

PLEADING.

Complaint. See BILLS AND NOTES, 2. MECHANICS' LIENS, 3.

1. Where a complaint states no more than the facts necessary to show plaintiff's right to declare and enforce a vendor's lien on

land, and shows that it was the pleader's intention to state that cause of action, it should not be held that a cause of action at law has been joined therewith merely because the prayer for relief is that plaintiff have judgment for the unpaid purchase price and, in case it be not paid by a day to be named by the court, that it be adjudged and enforced as an equitable lien on the land. *Uecke v. Held,* 416

Counterclaim.

2. In an action for a balance alleged to be due for lumber delivered under a contract for the sale of the plaintiff's entire stock of certain kinds of lumber at a specified price for all lumber of each kind graded as "No. 2 common and better," and a lower price for "No. 3 common," the answer alleged that plaintiff had wrongfully abstracted the best and most valuable portions of the lumber graded as "No. 2 common and better," and had delivered only the inferior portions, thereby reducing the value of that which was delivered to an amount much less than the contract price. *Held,* that the facts so alleged constitute a defense which would defeat in whole or in part plaintiff's recovery, and therefore should not be treated as a counterclaim or cross-complaint within sec. 2656, Stats. (1898). *Rib Falls L. Co. v. Lesh & M. L. Co.* 362

Amendment to conform to proof. See APPEAL, 12. MECHANICS' LIENS, 3.

3. Property was insured in several companies, and after a fire there was a dispute as to whether or not the loss was total. The assured finally agreed to allow a certain amount as salvage provided the insurance companies would pay in cash, which several of them did, and proofs of loss were made and forwarded to all the companies on that basis. In an action against the companies which did not settle, the complaint claimed damages on the basis of such proofs, but the uncontradicted evidence on the trial showed a total loss, and the jury rendered a verdict accordingly. *Held* that, in the absence of any showing that defendants were misled or placed at any disadvantage by the averments of the complaint, it was within the sound discretion of the court to allow the same to be amended to conform to the proof. *Clute v. Clintonville Mut. Fire Ins. Co.* 638

POLICE POWER. See CONSTITUTIONAL LAW, 3, 4. MUNICIPAL CORPORATIONS, 21–31.

POLITICAL PARTIES. See ELECTIONS, 2–4, 9, 10, 12–16.

POSSESSION. See VENDOR AND PURCHASER.

PRESUMPTIONS. See APPEAL, 12. CONTRACTS, 2. INSTRUCTIONS TO JURY, 5. REFERENCE, 1. WATERS AND WATERCOURSES, 1.

PRIMARY ELECTIONS. See APPEAL, 1. ELECTIONS, 11, 14, 16, 18–21, 24.

PRINCIPAL AND SURETY.

See BONDS. COURTS, 1.

Nature and extent of liability of surety: Injunction bonds.

1. The liability of a surety on an injunction bond given in a suit in a federal court pursuant to a law of the United States is governed by the principles adopted and applied by the federal courts, not by the state law. *Umbreit v. American B. Co.* 611

2. Under the laws of the United States as expounded by its courts the condition of a bond for payment of such damages as may

be *awarded* by reason of the issuance or continuance of an injunction is not broken so as to make the surety liable until the amount of the damages is assessed and determined and the principal obligor has refused to pay the amount awarded. *Ibid.*

PRIVILEGED COMMUNICATIONS. See APPEAL, 13.

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See INSURANCE, 7, 8. MASTER AND SERVANT, 26. NEGLIGENCE, 1, 2. RAILROADS, 20, 26.

PUBLIC HEALTH. See MANDAMUS, 4, 7. MUNICIPAL CORPORATIONS, 21-28.

PUBLIC USE. See RAILROADS, 3.

RAILROAD COMMISSION. See RAILROADS, 1-10.

RAILROADS.

Railroad Commission.

1. Where the Railroad Commission, in a proceeding instituted under sec. 1797—11*m*, Stats. (Laws of 1909, ch. 481), to compel construction of a spur track, exercises powers derived from that statute, the constitutionality of the statute is involved, although it was not necessary to exercise all the powers conferred thereby. *Union Lime Co. v. Railroad Commission,* 523
2. The power conferred upon the Railroad Commission by sec. 1797—11*m*, to determine the existence of certain facts which must exist before a railroad company can be compelled under that statute to construct a spur track, is not legislative power and may be delegated to the Commission. *Ibid.*
3. A spur track which, under sec. 1797—11*m*, a railroad company may be required to build, is not private, even though it serves a single industry the owners of which bear its initial cost, but becomes when built a part of the trackage of the railroad company, to be maintained and operated by it, open to the use of any one who may desire upon equal or equitable terms, and subject to state control under general laws; and hence land taken for the right of way of such a spur track is taken for a public, not for a private, use. *Ibid.*
4. Sec. 1797—11*m* does not contemplate that such a track may be built even though the sum total of its effect is somewhat harmful to public interest, but only when, as determined by the Railroad Commission, the public benefits so far outweigh any harm to public interest that the construction is advisable. *Ibid.*
5. The authority of the Railroad Commission to act under sec. 1797—11*m* is not confined to cases wherein it must exercise all the powers delegated: it may exercise such of those powers as are necessary in the particular case, be they many or few. Thus, although no right of way need be acquired for a spur track, the Commission may proceed to discharge the other duties imposed upon it by the statute. *Ibid.*
6. The Railroad Commission has no jurisdiction, in a proceeding to compel construction of a spur track, to pass upon a question of disputed title to land, even if all the proper parties are before it. That is purely a judicial question which must be determined by a court having jurisdiction thereof. *Ibid.*

7. In an action against the Railroad Commission to set aside its order requiring construction of a spur track, it was error for the trial court to pass upon the validity of easements held by the railroad company, when such company was not a party to the action. *Ibid.*

8. Even if the railroad company had been a party to such action the issue as to title to the right of way could not properly arise therein, being an issue between the company and other persons claiming the title. *Ibid.*

9. An order of the Railroad Commission directing the construction of a spur track, made without giving to any party interested therein or affected thereby an opportunity to be heard, must be set aside for that reason. A hearing previously given as to an entirely different route for the track, in which all parties participated, was not equivalent to a hearing as to the route finally selected. *Ibid.*

10. An order of the Railroad Commission providing that a spur track should be constructed within thirty days did not give the railroad company a reasonable time, in view of the fact that condemnation of the right of way might be necessary. *Ibid.*

Right of way: Spur tracks. See RAILROADS, 1–4, 6–9.

Operation: Injuries to persons on or near tracks.

11. Where a railway company whose track ran along the shore of Lake Michigan had constructed outside of such track a breakwater covered on top with planking which formed a firm and even walk or pathway, access to which from the street was unobstructed, and to the knowledge of the company's agents and servants such planked surface was used by the public as a pathway or walk and by boys as a place for boating, fishing, and swimming, the persons making such customary use of the premises were licensees, having implied permission so to use them, and not trespassers. *Brinilson v. C. & N. W. R. Co.* 614

12. Under such circumstances a licensee must be deemed to take the premises as he finds them, and the licensor owes him no duty except to refrain from acts of active negligence rendering the premises dangerous. *Ibid.*

13. Where in such breakwater the railway company had constructed a steam and hot-water pit, five feet in diameter at the top and six or seven feet deep, covered like the rest of the breakwater with planking, and had suffered a large hole in the covering, caused by the removal of one of the planks, to remain a long time unrepaired, and such hole was not readily observable, being obscured by the steam rising through it and through the cracks between the other planks, the company was guilty of active and actionable negligence rendering it liable for the death of a boy five and one-half years old who, while walking with an older brother along the plank covering of the breakwater, fell through the hole into the steam pit. *Ibid.*

14. Evidence that persons had observed such hole at various times, from three months before the accident down to the day thereof, warranted the jury in finding that the railway company was negligent in failing to discover the hole and repair it. *Ibid.*

15. In view of the tender age of the deceased and of the surrounding conditions, it cannot be held as matter of law that he was guilty

of contributory negligence in not observing and avoiding the hole. *Ibid.*

Same: Injuries to employees: Comparative negligence.

16. In an action against a railroad company for the death of a section foreman who was killed in a collision between his handcar and a train, the negligence of decedent and that of the engineer, both of which contributed to the accident, are *held* upon the evidence to have been ordinary negligence only. *Dohr v. Wisconsin Central R. Co.* 545

17. In such a case, under sec. 1816, Stats. (Laws of 1907, ch. 254), the trial court must ascertain and decide whether anything in the evidence would authorize the jury to find that the negligence of the engineer was greater and contributed in a greater degree to cause the injury than that of the decedent. *Ibid.*

18. In all cases in any wise doubtful those questions should be submitted to the jury. *Ibid.*

19. In ascertaining whether the negligence of one is greater than that of another the court is to consider that care must be proportionate to the risks to be apprehended and guarded against. *Ibid.*

20. Negligence of the injurer may be held to contribute in a greater degree to cause the injury where, other things being equal, such negligence displays a greater lack of ordinary care than that of the injured person, or where the negligence of the injured person was only remotely or not at all the cause of his injury, while the negligence of the other person was the proximate cause of the injury. *Ibid.*

21. These comparisons are made not on the ancient classification of negligence into slight, ordinary, and gross, but by comparing the ordinary negligence of one with the ordinary negligence of the other and ascertaining which was the more culpable. *Ibid.*

22. It appearing in this case that each of the two servants of the railroad company, the injured and the injurer, was of equal rank and authority in the management of the vehicle used and controlled by him; that the responsibility resting on each for his safety and the safety of others was equal; that their opportunities for anticipating and avoiding danger were equal; that the necessity for the injurer to continue his course without stopping was more imperative; that the injured servant was required by rules to exercise diligence to keep out of the way of the injurer; and that the injury resulted from the collision of the two vehicles negligently moved in opposite directions to a meeting point on the same track, it cannot be said that the negligence of the injurer was greater than that of the injured, and there was no question in that respect for the jury. *Ibid.*

Same: Fires. See COSTS, 2.

23. A finding by the jury that a fire which started in dry wood piled upon defendant's right of way was caused by sparks from an engine which had passed a short time before, is *held* to be sustained by evidence which justified the rejection of all other alleged causes and tended to show, among other things, that such engines, even when free from defects and properly managed, did commonly emit sparks, although no witness testified to having seen sparks lodge at the place where the fire was first observed. *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 321

24. A railway company which as a common carrier is obligated to receive and transport firewood must conduct such business with a degree of care commensurate with the resulting dangers and hazards to the property of others from fire. *Ibid.*

25. Upon evidence in this case, stated in the opinion, the jury were justified in finding that defendant was negligent in permitting a quantity of wood to remain at such place and in an inflammable condition. *Ibid.*

26. Negligence of a railway company in permitting highly inflammable firewood to remain upon its right of way was the proximate cause of the destruction of neighboring property by a fire which was started in the wood by sparks from an engine, where the danger to such property from a burning of the wood was obvious. *Ibid.*

27. The notice of a claim for damage to property by fire which must be given to a railway company before an action can be maintained and which, under the terms of sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307), is to be "signed by the party owning such property . . . his agent or attorney," may be signed by the assignee or subrogee of the original owner, or by an agent or attorney. *Ibid.*

28. Insurance companies which have paid to the original owner the amount of loss on property damaged or destroyed by a fire set by a locomotive are subrogees of such owner and may give the notice prescribed by sec. 1816*b*, Stats. (Supp. 1906: Laws of 1899, ch. 307). *Ibid.*

REAL PROPERTY. See ACTION. BOUNDARIES. CONTRACTS, 7–9. LOGS AND TIMBER. TAXATION. VENDOR AND PURCHASER.

REASONABLE DOUBT. See INSTRUCTIONS TO JURY, 10.

REDEMPTION. See TAXATION.

REFERENCE.

See CONTRACTS, 3.

1. Where the record does not show what proofs were produced in support of a motion to refer, it will be presumed on appeal that a case was made warranting the order of reference, if the character of the action was such that it might be referred under any circumstances. *Wojahn v. National Union Bank,* 646

2. Findings of a referee appointed to hear, try, and determine a case should not, when reviewed by the circuit court, be treated from an original standpoint, but should have the same force and significance that findings of a trial court have upon review in this court. They should be affirmed unless contrary to the clear preponderance of the evidence, due weight being given to the superior advantages which the referee has for discovering the truth. This means that, ordinarily, such findings should not be disturbed unless manifestly so contrary to the evidence as to be really unexplainable except upon the theory that wrong rules of law were applied or material evidence wholly overlooked or a perverted view taken of the case. *Ibid.*

3. Findings of a referee, stated in the opinion, are *held* not to have been so contrary to the clear preponderance of the evidence as to justify the trial court in disturbing them. *Ibid.*

REPEAL of ordinance. See MUNICIPAL CORPORATIONS, 10–13.

REPUTATION. See INSTRUCTIONS TO JURY, 11.

REQUESTS FOR INSTRUCTIONS. See INSTRUCTIONS TO JURY, 4.

RESCISSION. See ACTION. SALES, 4–6. VENDOR AND PURCHASER, 2.

RES GESTÆ. See WILLS, 1.

RETROACTIVE STATUTES. See ABATEMENT AND REVIVAL, 2.

REVERTER. See TRUSTS AND TRUSTEES, 1, 2.

RIGHT OF WAY. See RAILROADS, 11–15, 23–28.

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES, 3, 4.

SALES.

Requisites and validity. See FRAUDS, STATUTE OF. GAMING.

Construction of contract: Place of delivery.

1. Where a written contract for the sale of chattels at a specified price delivered f. o. b. cars at a certain station provides that, as a mode of securing the seller, he may ship the goods to their destination to his own order, drawing upon the buyer for the amount due and attaching the bill of lading to the draft, the place of delivery, for the purpose at least of fixing the measure of damages for a failure to deliver, is the place specified for delivery f. o. b. cars. *Southern F. & G. Co. v. McGeehan,* 130
2. Parol evidence of the intention of the parties is not admissible in such a case. *Ibid.*
3. The measure of damages for a failure to deliver in such a case is the difference between the price at which the goods were purchased and the market price at the place of delivery. *Ibid.*

Rescission by the buyer.

4. Representations by the seller of a second-hand automobile that it was in a good state of repair and efficiency and would develop eighteen horse power and operate all right, made to a buyer who was unfamiliar with the mechanism of automobiles and so informed the seller, relied upon by the buyer and understood by both parties as conditions upon which the car was purchased, become a part of the contract of sale, and failure of the car to conform thereto warrants a rescission by the buyer. *Greene v. Curtis Automobile Co.* 493
5. The buyer's right to rescind the sale in such case was not waived by his accepting from the seller a written memorandum stating in detail the repairs which the seller proposed to make and adding, "if the above repairs do not make car right will dispose of the same," where it appears that the giving of such writing was but a step in a continued attempt of the seller to put the car in proper condition and that, notwithstanding such repairs, the car still failed to conform to the contract. *Ibid.*
6. After rescission by the buyer, no act of the seller in rebuilding the car or any of its parts to make it conform to the conditions of the sale would bind the buyer. *Ibid.*

Warranty. See DAMAGES, 9.

SCHOOLS AND SCHOOL DISTRICTS.

Establishment. See MUNICIPAL CORPORATIONS, 1, 2, 4, 6, 33-39. TRUSTS AND TRUSTEES, 2, 8. WILLS, 2.

District schools.

1. The ward schools of a city are "district" schools within the meaning of sec. 3, art. X, Const., and whatever may lawfully be taught in such schools must be taught without the exaction of tuition fees from resident children of school age. *Maxcy v. Oshkosh,* 238

Contract with teacher: Validity.

2. A school district board has no power to contract with a teacher otherwise than as provided by the statute. *Pearson v. School District No. 8,* 620
3. An oral contract made by a school district board with a teacher is valid in the absence of any statutory requirement that it be in writing. *Ibid.*
4. The provision in sec. 438, Stats. (1898), that the contract with a teacher, with a copy of the teacher's certificate attached thereto, shall be filed with the clerk, is directory only, relating to a detail of the keeping of a record, and does not preclude the making of a valid oral contract. *Ibid.*

SCIENTIFIC BOOKS. See TRIAL, 5.

SECURITY FOR COSTS. See COURTS, 1.

SETTLEMENT. See COMPROMISE AND SETTLEMENT.

SHERIFFS. See COSTS, 3.

SPECIAL VERDICT. See MASTER AND SERVANT, 30. NEGLIGENCE, 2. TRIAL, 10-12.

SPRINKLING STREETS. See MANDAMUS, 4, 6, 7. MUNICIPAL CORPORATIONS, 9-11, 13, 28-31.

SPUR TRACKS. See RAILROADS, 1-4, 6-9.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. COURTS, 2. ELECTIONS, 1-17. JUSTICES' COURTS, 1. MUNICIPAL CORPORATIONS, 31. RAILROADS, 1, 2.

Mandatory or directory? See MUNICIPAL CORPORATIONS, 8. SCHOOLS AND SCHOOL DISTRICTS, 4.

Retroactive statutes. See ABATEMENT AND REVIVAL, 2.

Amendment and repeal. See MUNICIPAL CORPORATIONS, 10-13, 16, 17.

Construction. See ABATEMENT AND REVIVAL, 1. APPEAL, 4, 5, 9. BONDS, 1, 5, 6. CORPORATIONS, 6. COURTS, 2, 3, 5, 6. ELECTIONS, 18, 20, 22. GAMING, 1. JUSTICES' COURTS. MASTER AND SERVANT, 5, 7, 11, 30. MECHANICS' LIENS, 1, 2. MUNICIPAL CORPORATIONS, 7, 8, 34-39. PLEADING, 2. RAILROADS, 1-5, 17, 27, 28. SCHOOLS AND SCHOOL DISTRICTS, 4. SUNDAY. TAXATION. WILLS, 6.

1. To determine the purpose of a statute expressed in literal sense, words necessarily implied from those used, are as clearly a part thereof as the written words. *State ex rel. McGrael v. Phelps,* 1

2. In searching for the purpose of an enactment which, applied in the ordinary sense to the subject thereof, would lead to a result so unreasonable as to suggest that such was not its purpose, some other and a reasonable meaning should be adopted, if one can be found within the fair scope of the language used. *Ibid.*

3. In the situation suggested in the last foregoing, the court may "consider the surrounding circumstances, the existing conditions, the evils to be remedied, the objects to be attained," "look at the whole and every part of the statute, to its subject matter, to its effects and consequences, to its reason and spirit," and then read it with all words in place, necessarily or reasonably implied, so as to harmonize and give a sensible effect to every portion thereof and express the apparent intent. *Ibid.*

4. Where language in a statute, taken literally, is meaningless, but the legislative intent is manifest from the context or history of the enactment, words may be transposed, stricken out, or interpolated, or may be given a very restrictive or a very broad meaning, in aid of judicial construction, for the purpose of giving effect to such manifest intent. *Neacy v. Supervisors of Milwaukee Co.* 210

5. Thus, by transposition and addition of words, ch. 356, Laws of 1903, is construed to read as follows: "In any county in this state which now maintains or shall hereafter maintain, or shall desire to establish or relocate and maintain, under any law of the state of Wisconsin, a house of correction . . . whenever it shall so determine the county board of such county may provide for acquiring and may acquire . . . all necessary land upon which to locate, relocate and maintain such house of correction," etc. *Ibid.*

STOCK AND STOCKHOLDERS. See CORPORATIONS, 3.

STREET RAILWAYS. See MANDAMUS, 4, 6, 7. MUNICIPAL CORPORATIONS, 7, 10, 11, 13, 29, 31.

STREETS. See MANDAMUS, 4, 6, 7. MUNICIPAL CORPORATIONS, 9–11, 13, 28–32.

SUBCONTRACTORS. See MECHANICS' LIENS.

SUBROGATION. See RAILROADS, 28.

SUFFRAGE. See ELECTIONS.

SUNDAY.

See EVIDENCE, 1.

1. Under sec. 4595, Stats. (1898), there can be no recovery on *quantum meruit* for advertisements published in a newspaper on Sunday,—at least unless they are shown to be within the exception. *Sentinel Co. v. A. D. Meiselback M. W. Co.* 224

2. A contract, made on a secular day, providing that plaintiff should enter defendant's employ on a subsequent secular day, was not void under sec. 4595, Stats. (1898), merely because plaintiff's salary was to commence on the first day of the next month, which was Sunday, where there was no provision that any work should be done on that day and both parties performed the agreement for a long time thereafter. *Lippert v. Garrick Theatre Co.* 413

SURETYSHIP. See BONDS. COURTS, 1. PRINCIPAL AND SURETY.

SURRENDER. See VENDOR AND PURCHASER, 2.

SURVEYS. See BOUNDARIES.

SURVIVAL. See ABATEMENT AND REVIVAL, 1.

TAXATION.

Levy. See MUNICIPAL CORPORATIONS, 37.

Exemptions. See WILLS, 6.

Redemption from tax sales: Infants.

1. If lands are conveyed to an infant after being sold for taxes and after the time for redemption has begun to run against the adult grantor, such time is extended, under sec. 1166, Stats. (1898), so that the infant may redeem at any time before coming of age or during one year thereafter. *Corry v. Shea,* 135
2. But if such conveyance is made without consideration and for the purpose of enlarging the time for redemption, it is void as against the holder of the tax certificate, under sec. 2320, Stats. (1898). *Ibid.*

TAXPAYERS' ACTION. See ACTION.

TEMPORARY INJUNCTION. See INJUNCTION, 1, 4.

TENDER. See CONTRACTS, 8. INSURANCE, 5. MUNICIPAL CORPORATIONS, 36.

TERMS OF COURT. See COURTS, 2–6.

TIMBER. See LOGS AND TIMBER.

TRESPASSERS. See RAILROADS, 11–15.

TRIAL.

Course and conduct of trial: Improper conduct of counsel.

1. Improper conduct or remarks of counsel during a jury trial, not appearing to have had a prejudicial effect, are not ground for reversal of the judgment. *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 321

Same: Jury. See JURY.

Reception of evidence: Introduction, offer, and admission of evidence. See APPEAL, 14. CRIMINAL LAW. FRAUDS, STATUTE OF. HOMICIDE. MASTER AND SERVANT, 12, 21, 32. SALES, 2.

2. A question asked of an expert witness as to the appliances ordinarily used in doing certain work under conditions with which he had had little or no experience, was properly excluded. *Gibson v. Milwaukee L., H. & T. Co.* 140
3. A question asked of another servant as to whether the foreman knew, before plaintiff was injured, that the witness had been injured by a similar explosion, was competent. *Ruck v. Milwaukee Brewery Co.* 404
4. Where insured property destroyed by fire was nearly all received by the assured from one company which was claimed by the insurance companies to be the real owner, statements made by such company to a bank prior to the fire as to the amount of its accounts receivable, offered in evidence to prove such ownership, were properly excluded, especially where such statements

were not itemized and there was no proof that they did not include, and it was possible they did include, the amount which the assured admitted that they owed such company, and no other testimony as to ownership was offered in connection therewith. *Clute v. Clintonville Mut. Fire Ins. Co.* 638

Same: Scientific books.

5. On the trial of a cause before the court without a jury it is not error to receive in evidence scientific books and reports of scientific bodies for the purpose of informing the court. Such books and reports so offered in evidence have only the weight and value of like books and reports read by the court without having been offered in evidence. *Adams v. Milwaukee,* 371

Same: Objections, motions to strike out.

6. When the object of evidence is plainly indicated by the questions propounded to a witness, and no objection to them is made, a motion to strike out the testimony comes too late. *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 321

7. An objection to a question as incompetent does not reach the fault that the question assumes the existence of a fact not proven. *Ruck v. Milwaukee Brewery Co.* 404

8. Where evidence is admissible for any purpose, a mere general objection thereto is properly overruled. *Driscoll v. Allis-Chalmers Co.* 451

Taking case or question from jury. See APPEAL, 3. CONTRACTS, 16. GAMING, 3. MASTER AND SERVANT, 23, 29. RAILROADS, 18.

Instructions to jury. See APPEAL, 8, 15. INSTRUCTIONS TO JURY. INSURANCE, 2, 3. MASTER AND SERVANT, 7, 11, 30.

Same: Requests for instructions. See INSTRUCTIONS TO JURY, 4.

Verdict. See APPEAL, 11. AUTOMOBILES. NEGLIGENCE, 4.

Same: Inconsistent findings.

9. A finding by the jury that the market price of hay at a certain place was the same as the purchase price named in a contract providing for delivery f. o. b. cars at said place, is not inconsistent with a finding that the buyer's damages for a failure to deliver were twenty-five cents per ton, because the latter finding may refer to the value f. o. b., which the former does not expressly cover. *Southern F. & G. Co. v. McGeehan,* 130

Special verdict. See MASTER AND SERVANT, 30. MUNICIPAL CORPORATIONS, 2.

10. In answer to the first two questions of the special verdict the jury found that defendants made the alleged threat to induce the signing, and that plaintiff was induced thereby to sign; to the third question, "Did such threat so affect the plaintiff's mental condition that at the time he signed the bill of sale he was incapable of the free exercise of his will power?" they answered "Yes, partially." *Held,* that the last answer is not indefinite or uncertain; that, properly construed, it means that the threat so partially affected plaintiff's mental condition that he was incapable of the free exercise of his will power, but even if it means that he was *partially incapable* of such free exercise it is a sufficient finding of duress. *Price v. Bank of Poynette,* 190

11. Admitted facts need not be included in a special verdict, but may properly be included in order that the verdict may cover all material facts. *Keena v. American Box Toe Co.* 231

12. An appropriate form of special verdict is suggested in an action where an infant employee sues for injuries alleged to have resulted from the employer's failure to give warning of dangers incident to the work. *Ibid.*

By court: Findings. See REFERENCE, 2, 3.

13. Findings of the trial court negativing alleged fraud will not be disturbed on appeal unless palpably unsupported by evidence and having no reasonably fair basis in the record. *Neacy v. Supervisors of Milwaukee Co.* 210

14. MARSHALL, J., speaking independently, suggests a stricter compliance by trial judges with the statute (sec. 2863, Stats. 1898) relating to findings of fact and conclusions of law. *Ibid.*

TRUSTEE OF AN EXPRESS TRUST. See BONDS, 5.

TRUSTS AND TRUSTEES.

Public charitable trusts: Creation, construction, and operation. See WILLS, 3–7.

1. If a will contains no express provision for a reverter in the event of a diversion of a fund given for a public purpose, none can be implied. *Maxcy v. Oshkosh,* 238

2. After reciting that her deceased husband had wished to give property to a city *in trust* for the founding of an educational institution, and that her will was made for the purpose of carrying out such wish, testatrix gave property to trustees to be held in trust for the purpose of building and perpetually maintaining a manual training school. Upon certain conditions the property was to be transferred to the city or to trustees for it, to be used perpetually to provide and maintain such a school. There was no provision for a reverter. *Held,* that a public charitable trust was thereby created. *Ibid.*

3. One giving property by will to any legitimate charity may generally prescribe the conditions under which the donation is made, and when those conditions are accepted there is a binding obligation which may be enforced through the courts. *Ibid.*

4. In order to create a public charitable trust there must be some public benefit open to a vague and indefinite number of persons until they are selected or appointed to be the particular beneficiaries of the trust for the time being. *Ibid.*

5. A city may become the trustee of a charitable trust where the donation is made to aid some public purpose, charitable in its nature, which it is the legal duty of the city to support and provide for; and when such a trust is accepted the city assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts, and must perpetually administer the charitable fund in accordance with the expressed wish of the donor. *Ibid.*

6. Property devoted to a charitable use, where a trust is created, must, if the gift is accepted, be irrevocably devoted to such use, and, in case of any attempted diversion, equity will intervene and, if necessary, name a new trustee to carry out the purpose of the trust. *Ibid.*

7. The term "perpetuity," as applied to charitable trusts, retains its original meaning of an inalienable and indestructible interest, subject, however, to unforeseen social changes or eventualities preventing the continued existence of the trust. *Ibid.*

8. A city may lawfully contribute funds to aid in the construction of a public school building provided for in part by a gift made under such circumstances as to create a trust in perpetuity and therefore requiring the permanent maintenance of the school. *Ibid.*

9. It is the duty of the courts to uphold charitable bequests if it can be done without violating any provision of statute or principle of law. *Ibid.*

TUBERCULOSIS. See MUNICIPAL CORPORATIONS, 21, 22.

USAGE AND CUSTOM. See CONTRACTS, 12. MASTER AND SERVANT, 21.

USER. See WATERS AND WATERCOURSES.

UXORICIDE. See HOMICIDE.

VACANCY. See ELECTIONS, 20, 21, 24.

VENDOR AND PURCHASER OF LAND.

Construction and operation of contract.

1. Where, pursuant to an oral contract for the sale of land, the vendor executed a deed and deposited it in escrow to be delivered to the grantee on payment of the balance of the purchase money by a specified date, and the grantee went into possession, no title passed, and the deed had no validity until the condition was fulfilled. *Wilcox v. Scallon,* 74

2. In such case the interest which the vendee acquired was at best only the right to a conveyance on payment of the balance of the agreed price, and such interest could be and was surrendered by a subsequent oral agreement between the parties, entered into after default, whereby the sale was rescinded and the purchaser and his family were to remain upon the land and have the use of the same upon condition that they should pay the taxes and make improvements thereon. *Ibid.*

VENUE.

Trial courts are vested with a large discretion in passing upon applications, under subd. 2, sec. 2622, Stats. (1898), for change of venue on the ground that an impartial trial cannot be had in the county. *Theresa Village Mut. F. Ins. Co. v. Wis. Cent. R. Co.* 321

VERDICT. See APPEAL, 11. AUTOMOBILES. NEGLIGENCE, 4. TRIAL, 9–12.

VETERINARIANS. See EVIDENCE, 2.

VICE-PRINCIPAL. See MASTER AND SERVANT, 17.

VOTE. See ELECTIONS. MUNICIPAL CORPORATIONS, 8, 9.

WAIVER. See APPEAL, 2. COURTS, 3. SALES, 5.

WARRANTY. See DAMAGES, 9.

WATERWORKS. See MUNICIPAL CORPORATIONS, 14–17.

WATERS AND WATERCOURSES.

Dams and flowage.

1. Where, by user during more than forty years, a town acquired a prescriptive right to maintain a highway on a bank of a river, but during the same period recognized and acquiesced in the right of the owners of a lawful milldam lower down on the stream to maintain such dam at substantially the same height and to keep the water adjacent to the highway at about the same level, large sums being expended by such owners on the strength of their belief that they could continue such use of the water power, the town is not entitled to equitable relief restraining the mill owners from maintaining, by the use of flushboards on the dam, substantially the same conditions as had existed during the period mentioned, especially where the injury to the town is slight and the loss to the mill owners would be comparatively large. *Lawrence v. American W. P. Co.* 556
2. Acts of the town twenty-two years before commencing the action, and again four years before the action, in moving back the highway, without protest, because of the erosion of the bank theretofore caused by the water, showed conclusively that it recognized the right of the owners of the water power to maintain the water at its then level, and acquiesced therein. *Ibid.*
3. The owner of water power has a right, the whole year round, to the use of the stream and the banks below ordinary high-water mark as nature created them, subject to a reasonable use thereof by other owners of power and of riparian rights; and he may, in a season of low water, by artificial means restore the water to a higher stage, provided he does not raise it above ordinary high-water mark, and provided such restoration is reasonably necessary to the full enjoyment of his water rights and creates no essentially different conditions from those which would prevail were the rise of the stream a natural one. *Ibid.*
4. A mere riparian right is subject to reasonable use of the stream for power purposes, and if any damage results therefrom the owner of the right is without remedy. *Ibid.*
5. The owner of a water power whose use of the water is lawful and usual cannot be held liable for damage done to a highway so located on the edge of a stream above his dam that some injury thereto by the waters of the river is natural and inevitable, although the damage is increased by the combined action of upper proprietors in periodically shutting off the flow of the water, of the lower owner in then ponding it, and of nature in freezing and expanding it under such changing conditions, together with the natural stage of high water in the spring when the ice is carried away. *Ibid.*

WILLS.

Construction: General rules. See MUNICIPAL CORPORATIONS, 1–4. TRUSTS AND TRUSTEES.

1. Every will should, as far as possible, be interpreted from the standpoint of testator, and attendant circumstances, such as the condition of his family and the amount and character of his property, should be taken into consideration as part of the *res*

gestæ, when the language is not plain nor the meaning obvious. *Maxcy v. Oshkosh*, 238

2. A will which gave property to a city to found and maintain a manual training school, upon condition that an additional sum for the same purpose be raised by or for the city and that a tuition fee should be charged which in the judgment of the city should be sufficient, together with the income of the fund provided, to perpetually properly maintain the school, is construed, in the light of all the circumstances, as showing that it was the intention of the testatrix that tuition fees should be charged only to those pupils from whom the city might lawfully exact such fees (*i. e.* nonresident pupils and those over school age), and that the city might therefore lawfully comply with such condition. *Ibid.*

Same: Beneficiaries.

3. A bequest made in 1865 "to the various asylums or homes that have been formed or may be formed within a year throughout the loyal states for the orphans by the late war for the restoration of the Union," together with an intimation of the testator's wish that for a time the interest only be used "and that the bequest be so managed as to give the orphans, as they become of age, a sum of money to fit them out in life and thus gradually extinguish the fund," made the inmates of the institutions, and not the institutions themselves, beneficiaries, and evinced a clear intent that not only the interest but the corpus of the fund should go to the orphans. *Comstock v. Boyle*, 180

4. So, also, a subsequent bequest to the trustees of the Wisconsin Orphans' Home "for the benefit of the children," constituted the orphans the beneficiaries. *Ibid.*

5. The funds above mentioned, or a residue thereof, being held by the state in trust, the fact that it had been engaged in a similar charity and had spent large sums of its own money for the care and maintenance of the same orphans would not entitle it to reimburse itself out of said funds. *Ibid.*

6. Where, out of funds so held in trust by the state, land was purchased and title thereto taken by the state "in trust," such land was not "owned exclusively" by the state, within the meaning of subd. 2, sec. 1038, Stats. (1898), so as to be exempt from taxation. *Ibid.*

7. Exclusive ownership, within the meaning of said statute, is ownership free from any kind of legal or equitable interest in any one else. *Ibid.*

WITNESSES.

Attendance. See COSTS, 4.

Examination.

1. Refusal to allow a witness to be examined as an adverse witness under sec. 4068, Stats. (1898), cannot be held prejudicial error unless exception was taken and the examination was proceeded with so as to show prejudice from the ruling. *Dickson v. Bills*, 171

2. Whether the legislature can authorize the calling and examination of an employee of a corporation as an adverse witness, as

in sec. 4068, Stats. (Laws of 1907, ch. 271), without giving similar authority in respect to an employee of an individual, doubted.] *Keena v. American Box Toe Co.* 231

Cross-examination.

3. A question which has for its object the breaking down or weakening of the witness's direct testimony is proper cross-examination. *Gibson v. Milwaukee L., H. & T. Co.* 140

4. An expert witness having testified as to the degree of pressure to which bottles were subjected in the pasteurizing process, it was competent on cross-examination to call his attention to an article in a brewing journal, containing a different opinion on the subject, and ask him whether or not he had approved of such article. *Ruck v. Milwaukee Brewery Co.* 404

5. A witness having testified to seeing bottles explode and pieces of glass fly in all directions, it was competent to ask him whether or not they flew with such force as to inflict injury if they came in contact with the skin or body, any ordinary witness being competent to draw such a direct inference from what he has observed and to testify concerning it. *Ibid.*

Impeachment. See NEW TRIAL, 3.

Conflict of testimony. See INSTRUCTIONS TO JURY, 5.

WORDS AND PHRASES.

All things of mechanical or other technical work, in will. See MUNICIPAL CORPORATIONS, 2.
Assignees, in contract. See BROKERS, 3.
Completion, in statute. See MUNICIPAL CORPORATIONS, 39.
District schools, in constitution. See SCHOOLS AND SCHOOL DISTRICTS, 1.
Jurisdiction. See INJUNCTION, 3.
Liability, in city charter. See MUNICIPAL CORPORATIONS, 9.
Net profits, in contract. See CONTRACTS, 11, 12, 14.
Owned exclusively, in statute. See WILLS, 6, 7.
Perpetuity. See TRUSTS AND TRUSTEES, 7.
Person, in statute. See ELECTIONS, 22.
Profits, in contract. See CONTRACTS, 11, 14.
Subject matter, in statute. See INJUNCTION, 3.
Trustee of an express trust, in statute. See BONDS, 5.
Vacancy, in statute. See ELECTIONS, 21.

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